TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted] 68

SOUTH COAST STEAMSHIP COMPANY, PETITIONER,

vs.

J. C. RUDBACH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 18, 1919.

CERTIORARI AND RETURN FILED JUNE 2, 1919.

(26,886)

(26,386)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 385.

SOUTH COAST STEAMSHIP COMPANY, PETITIONER,

vs.

J. C. RUDBACH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JAMES D. MAHER

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTH COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamer "SOUTH COAST," etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Names and Addresses of Attorneys.

IRA S. LILLICK, Esquire, Proctor for Libelant.

MARCEL E. CERF, Esquire, H. W. GLENSOR, Esquire, and CHAS. H. SOOY, Esquire, Proctors for Respondent and Claimant.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

No. 15,939.

J. C. RUDBACH,

Libelant and Appellee,

vs.

The Steamer "SOUTH COAST," etc.,

Respondent.

SOUTH COAST STEAMSHIP COMPANY (a Corporation),

Claimant and Appellant.

Praecipe (and Stipulation and Order Re Exhibits).

To the Clerk of Said Court:

Sir: Please issue and forward to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, apostles in the above-entitled libel and include therein the following:

Libel;

Answer to libel and exhibit thereto attached;

Reporter's transcript;

Opinion and order to enter a decree in favor of the libelant for the amount prayed for;

Final decree;
Notice of appeal;
Assignment of errors;
Claimant's Exhibit "B";
This praecipe and stipulation;
Stipulation dated December 23, 1915.

And please forward to the clerk of the United States Circuit Court for the Ninth Circuit the following exhibits, to wit: [1*]

Libelant's Exhibits Nos. 1, 2, 3, 4, 5, and 6; Claimant's Exhibit "A."

Dated September 28, 1916.

MARCEL E. CERF,
C. H. SOOY,
Proctors for Claimant and Appellant.

It is hereby stipulated and agreed that the apostles in the above-entitled libel need include nothing except that which is enumerated in the foregoing Praecipe, and that the exhibits enumerated above may be delivered to the clerk of the United States Circuit Court for the Ninth Circuit, as above requested.

Dated September 28, 1916.

IRA S. LILLICK,
Proctor for Libelant and Appellee.
MARCEL E. CERF,
C. H. SOOY,
Proctors for Libelant and Appellee.

By the Court: It is so ordered.

Dated September 28, 1916.

M. T. DOOLING,
Judge.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

[Endorsed]: Filed Sep. 28, 1916, W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [2]

In the District Court of the United States, for the Northern District of California.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Boilers, Engines, Machinery, Tackle, Apparel and Furniture,

Respondent.

Libel for Supplies, etc.

To the Honorable M. T. DOOLING, Judge of the District Court of the United States for the Northern District of California:

The libel of J. C. Rudbach, by occupation a merchant and ship chandler, against the steamer "South Coast," her boilers, engines, machinery, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract civil and maritime, alleges:

I.

That heretofore, to wit, between the 11th day of August, 1915, and the 1st day of November, 1915, the steamer "South Coast," then and there lying at the port of San Pedro, stood in need of certain supplies, provisions and other necessaries to enable her to perform her voyages upon the Pacific Ocean and elsewhere, and the said J. C. Rudbach then and there, upon the orders of the owners of said vessel, and the agent of said owners, furnished certain supplies, provisions and other necessaries in this [3] State for the furnishing of said vessel, and upon the credit of said vessel, to wit, certain goods, wares and merchandise for the supplying and provisioning of said vessel at agreed prices and of the reasonable value of Twelve Hundred Fifty-three and 73/100 Dollars ($1253.73), which said amount the owners of said vessel, and the agent of said owners then and there agreed to pay.

II.

That no part of said sum of Twelve Hundred Fifty-three and 73/100 Dollars ($1253.73) has been paid, and that the whole thereof remains unpaid, and notwithstanding the same is due, the said owners of said vessel have neglected, and still neglect, to pay the same, or any part thereof, after demand therefor has been made.

III.

That said amount so due is a lien upon said vessel under and by virtue of the provisions of section 813 of the Code of Civil Procedure of the State of California, and of that certain provision of the Revised Statutes of the United States entitled "An Act Relating to Liens on Vessels for Repairs, Supplies or other Necessaries." (36 Stat. 604.)

AND FOR A FURTHER AND SECOND CAUSE OF ACTION LIBELANT ALLEGES:

I.

That at all of the times hereinafter mentioned

Marine Hardware Co. was, and still is, a corporation duly formed, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of San Pedro, said State.

II.

That heretofore, to wit, between the 11th day of May, [4] 1915, and the 31st day of August, 1915, the steamer "South Coast," then and there lying at the port of San Pedro, stood in need of certain supplies, provisions and other necessaries to enable her to perform her voyages upon the Pacific Ocean and elsewhere, and the said Marine Hardware Co. then and there, upon the orders of the owners of said vessel, and the agent of said owners, furnished certain supplies, provisions and other necessaries in this State for the furnishing of said vessel, and upon the credit of said vessel, to wit, certain goods, wares and merchandise for the supplying and provisioning of said vessel at agreed prices and of the reasonable value of Three Hundred Ninety-five and 76/100 Dollars ($395.76).

III.

That the said owners of said vessel, and said agent of said owners, have paid no part or portion of said sum of Three Hundred Ninety-five and 76/100 Dollars ($395.76), with the exception of the sum of Two Hundred and Fifty Dollars ($250.00), and that the balance of said sum, to wit, the sum of One Hundred and Forty-five and 76/100 Dollars ($145.76), and every part thereof, remains wholly due and unpaid, and notwithstanding that the same is due, the said owners of said vessel have neglected, and still neglect, to pay the same, or any part thereof, notwithstanding that demand has been made for said payment.

IV.

That said amount so due is a lien upon said vessel under and by virtue of the provisions of section 813 of the Code of Civil Procedure of the State of California, and of that certain provision of the Revised Statutes of the United States [5] entitled "An Act Relating to Liens on Vessels for Repairs, Supplies or other Necessaries." (36 Stat. 604.)

V.

That the said Marine Hardware Co. has duly assigned, transferred, set over and delivered to libelant all of its right, title and interest in and to said claim of One Hundred Forty-five and 76/100 Dollars ($145.76) against said vessel, and that libelant is now the owner and holder thereof.

VI.

That said vessel is now in the Northern District of California and within the jurisdiction of this Honorable Court.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE the libelant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steamer "South Coast," her boilers, engines, machinery, tackle, apparel and furniture, and that all persons claiming any right, title or interest therein may be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court will be pleased to decree the payment of the sum of Twelve Hundred Fifty-three and 73/100 Dollars ($1253.73) and interest, and One Hundred Forty-five and 76/100 Dollars ($145.76) and interest, with costs, and that said vessel, her boilers, engines, machinery, tackle, apparel and furniture be condemned and sold to pay the same; and that this libelant have such other and further relief in the premises as in law and justice he may be entitled to receive.

J. C. RUDBACH.

IRA S. LILLICK,
Proctor for Libelant. **[6]**

State of California,
City and County of San Francisco,—ss.

J. C. Rudbach, being first duly sworn, deposes and says: That he has read the within and foregoing libel; that he knows the contents thereof, and that the same is true of his own knowledge.

J. C. RUDBACH.

Subscribed and sworn to before me this 2d day of December, 1915.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 2, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[7]**

In the District Court of the United States for the Northern District of California.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Boilers, Engines, Machinery, Tackle, Apparel and Furniture,

Respondent.

Answer.

The answer of South Coast Steamship Company, a corporation, claimant, to the libel of J. C. Rudbach against the steamer "South Coast," in said alleged cause of contract, civil and maritime, alleges and denies as follows:

I.

Alleges that at all of the times referred to in said libel the said steamer "South Coast" was in the possession of Howard R. Levick, Jr., under a charter thereof in accordance with the terms of a charter-party, copy of which is hereto annexed, marked exhibit "A," and is hereby made a part hereof; and all of the supplies, provisions and other necessaries referred to in said libel were ordered by said charterer, and by the terms of said charter-party the said charterer was without authority to bind said steamer therefor; all of which libelant knew, or by the exercise of reasonable diligence could have ascertained, at the time the supplies, provisions and other necessaries were furnished, as alleged in said libel.

II.

Denies that libelant furnished the supplies, provisions and other necessaries referred to in Article I, of said libel, or any supplies, provisions or other necessaries on the order of the [8] owners of said vessel, and/or the agent of said owners, and/or upon the credit of said vessel.

III.

Denies that the owners of said steamer "South Coast" and/or the agent of said owners agreed to pay libelant the sum of twelve hundred fifty-three and 73/100 ($1,253.73) dollars, as is alleged in Article II of said libel, or any sum.

IV.

Denies that the amount referred to in Article III of said libel, or any amount, is a lien upon said vessel, as is alleged in said Article III, or at all.

ANSWER TO FURTHER AND SECOND CAUSE OF ACTION ALLEGED IN LIBEL.

The answer of South Coast Steamship Company, a corporation, claimant, to the further and second cause of action set forth in the libel of J. C. Rudbach against the steamer "South Coast," in an alleged cause of contract, civil and maritime, alleges and denies as follows:

I.

Alleges that at all of the times in said libel referred to the said steamer "South Coast" was in the possession of Howard R. Levick, Jr., under a charter thereof, in accordance with the terms of a charter-party, a copy of which is hereto annexed, marked exhibit "A," and is hereby made a part thereof; and all of the supplies, provisions and other necessaries referred to in said second cause of action set forth in said libel, were ordered by said charterer, and by the terms of said charter-party the said charterer was without authority to bind said steamer therefor; all of which Marine Hardware Co., referred to in said libel knew, or by the exercise of reasonable diligence could have ascertained at the [9] time th supplies, provisions and other necessaries were furnished, as alleged in said second cause of action.

II.

Denies that said Marine Hardware Co. furnished the supplies, provisions and other necessaries referred to in Article II, of said second cause of action, or any supplies, provisions or other necessaries on the order of the owners of said vessel, and/or the agent of said owners, and/or upon the credit of said vessel.

III.

Denies that the amount referred to in Article IV of said second cause of action, or any amount, is a lien upon said vessel, as alleged in said Article IV, or at all.

WHEREFORE claimant prays that said libel be dismissed, and for its costs.

SOUTH COAST STEAMSHIP COMPANY,
Claimant,
By C. H. SOOY,
Secretary.
MARCEL E. CERF,
H. W. GLENSOR,
C. H. SOOY,
Proctors for Claimant.

State of California,
City and County of San Francisco,—ss.

C. H. Sooy, being first duly sworn, deposes and says: That he is an officer, to wit, Secretary of the South Coast Steamship Company, a corporation, claimant in the above-entitled proceedings, and that he makes this affidavit and verifies this answer for and on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

C. H. SOOY.

Subscribed and sworn to before me this 29th day of December, 1915.

[Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California. [10]

Exhibit "A" to Answer.

COPY.

THIS CHARTER PARTY made and concluded in the City and County of San Francisco, State of California, on this the 19th day of June, 1915, by and between the South Coast Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at San Francisco, in said State, the party of the first part, and Howard R. Levick, Jr., of the same place, party of the second part,

WITNESSETH:

FIRST. That the party of the first part for and in consideration of the covenants and agreements hereinafter mentioned, which are to be performed and kept by the party of the second part, does covenant and agree upon the chartering and letting to hire of the steamship or steam schooner "South Coast" unto the said party of the second part for the period of eighteen months from date hereof.

SECOND. That said vessel shall be employed by said party of the second part during the term of this charter party between ports and places on the Pacific Coast of North America, not north of Seattle, nor in any port or ports, nor place or places, nor provided for in the insurance policies covering the insurance to be placed upon said vessel, as hereinafter provided. The cargoes carried by said vessel are to be laden and/or discharged at any dock or place where the party of the second part or his agents may direct, provided that the steamer can always lie afloat at all stages of the tide.

THIRD. The party of the first part hereby places said vessel at the disposal of said party of the second part at the port of San Francisco on this date, and the party of the second part agrees [11] that he has thoroughly inspected the said vessel, knows her condition at the present time and that he takes said vessel by virtue of this instrument in her present order and condition, and that no representations or promises of whatsoever kind or nature have been made to said party of the second part in regard thereto, and that neither the said party of the first part nor the said vessel shall be liable for any damages, injury or loss that may occur by reason of any defects in the body, tackle, apparel, machinery or appliances of said vessel, even if the same now exists or existed before the commencement of any voyage under this charter party, or at any time during the term of this charter party.

FOURTH. The said party of the second part agrees to immediately, upon taking possession of said vessel, to tow her to the port of Los Angeles, there to install additional tankage of oil facilities according to the requirements of the United States Government, and to make in a thorough and workmanlike manner all repairs of every kind or nature that may be necessary to put the ship in a thoroughly seaworthy condition, and in accordance with the requirements of the United States Inspectors at said Port and, thereafter, during the life of this agreement to maintain said ship in as good condition, after said repairs and tankage is installed, as she will be upon the commencement of her first voyage, reasonable wear and tear excepted. Said party of the second part further agrees that the expense of installing tankage and making said repairs, and the towage and maintenance of said ship, as hereinabove provided, shall be at his own cost and expense.

FIFTH. It is understood that this charter is a charter of the bare vessel, and that said party of the second part shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature [12] pay for all fuel, fresh water, port charges, wharfages, Customs charges, Customs fines or Government fines, pilotages, overtime of crew; agencies, commissions, Consular charges, drydocking, painting of the hull of said vessel, furnishing all lines and slings, and pay all other charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise that may be incurred in or about the use of said vessel during the term of this charter.

SIXTH. The party of the first part shall have the right to appoint the master and chief engineer of said vessel, but the wages thereof shall be paid by the party of the second part. Said master and chief engineer shall be under the orders of said party of the second part as to the management of said ship, but in the event a dispute shall arise between the parties hereto, through the failure of the party of the second part to perform the conditions and agreements herein set forth, then the said master and chief engineer shall be under and subject to the orders of the party of the first part. In the event that there shall be any dissatisfaction on the part of the party of the second part with the master or engineer so appointed during the term of this charter-party, then said party of the first part will appoint another master and chief engineer in their place and stead.

SEVENTH. It is further understood and agreed that the said party of the first part shall not be liable for injury to or death of the captain, officers, crew, passengers or other persons on or about the vessel or on the wharves, or for any breach of contract of affreightment or transportation between the said party of the second part and third parties, and all liability for any and all of said matters and things shall be borne by the said party of the second part. Said party of the second part shall further protect the [13] said party of the first part against any and all actions for injury to or death of captain, officers, crew, passengers or other person in or about the said vessel, or on the wharves, by securing in the name of the party of the first part a liability policy of insurance, and pay the premium thereon.

EIGHTH. Said party of the second part hereby accepts the said vessel, and agrees to pay for the charter and use of said vessel during the term of this Charter Party, the sum of Twelve Hundred and Fifty ($1,250) Dollars for the first two months from and after date hereof, receipt of which sum in cash is hereby acknowledged, and to pay the sum of Five Hundred ($500) Dollars on August 18th, 1915; Five Hundred ($500) Dollars on September 19, 1915; Five Hundred ($500) Dollars on October 19, 1915; and One Thousand ($1,000) dollars per month thereafter on the 19th of each month until the sum of Fifteen Thousand Seven Hundred and Fifty ($15,750) Dollars has been paid, including said first payment, and thirty days thereafter to pay the party of the first part the sum of Twelve Hundred and Fifty ($1,250) Dollars, at which time and upon the payment of the said last mentioned sum, the party of the second part shall be entitled to receive from the International Banking Corporation a Bill of Sale to said vessel, which said Bill of Sale has been this day deposited by the party of the first part for delivery to the party of the second part when all of the conditions and obligations and promises and agreements herein contained upon the party of the second part to be performed have been complied with. The party of the second part agrees to make said payments promptly on the dates mentioned to the said International Banking Corporation for the account of the said party of the first part. In default of such payment, or the failure of said party of the second part within thirty **[14]** days after incurring the same, to discharge any debts or liabilities incurred by him which are liens on the said vessel, the party of the first part shall have the right to withdraw the said steamer from the service of the party of the second part without prejudice to any claim the party of the first part might otherwise have on the party of the second part for breach of this charter, and the said withdrawal shall not be construed as a waiver of any damages to which the said party of the first part would otherwise be entitled, but said failure to pay and said withdrawal shall be construed as a refusal of said party of the second part to continue the use of said vessel for the balance of this charter.

NINTH. The party of the second part shall not be entitled to any allowance of charter hire during the life of this charter party in the event that the said vessel shall become disabled by the breaking down of the boilers or engines or by injury or damage or breakage of any kind or nature to any part or portion of said ship or her tackle or apparel, and in this connection the party of the second part promises and agrees to blow down the said boilers of the said steamship "South Coast" at least once every forty-five days at the cost and expense of said party of the second part.

TENTH. Said party of the second part further covenants and agrees to and with the party of the first part that if said last payment above mentioned is not made, or any of the prior payments thereto have not been made, then at the option of the said party of the first part the said vessel shall be delivered unto the said party of the first part at San Francisco in as good condition as when received, reasonable wear and tear excepted, with clean holds and free from all liens and claims of every kind or description whatsoever during the term of this Charter Party, except the lien for any salvage services that may be rendered to said vessel, and that he, the [15] said party of the second part, will hold and save harmless the said party of the first part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter party, except any claim for salvage services that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith.

ELEVENTH. The party of the second part shall not have the right to assign or transfer this charter and/or option to purchase without the consent of the party of the first part.

TWELFTH. Should the steamship "South Coast," during the term of this charter party, salve and/or tow, or assist in any way in the salving or towing of any vessel in distress, or salve, and/or *two* or assist in salving or in towing any other property, flotsam or jetsam, the party of the first and second parts hereto are to share equally in any money or other property paid or awarded to said steamship "South Coast" by way of salvage and/or towage for such services, after payment of any award to captain, officers and/or crew; time so used to count under this charter.

THIRTEENTH. In the event that said vessel be lost during the life of this charter party, then the party of the second part shall pay the charter hire herein set forth to the party of the first part, notwithstanding such loss, it being understood, however, that the insurance money, if any, shall be paid to the party of the first part on account of said loss, and shall be deducted from the whole amount of said charter hire to be paid under this charter **[16]** party, and if there be any difference then remaining, the same shall be paid by the said party of the second part to the said party of the first part. In the event that no insurance shall be collected, then said amount of said charter party shall be paid by said party of the second part to said party of the first part, notwithstanding.

FOURTEENTH. The party of the first part shall have a lien upon all cargoes and all sub-freights, and the cargo money and the sub-freight money for any amounts due under this charter.

FIFTEENTH. It is agreed that the said vessel is to be employed only in strictly neutral trade, and is not to carry explosives, contraband of war or trade to or from ports under blockade or while hostilities are eminent or in progress.

SIXTEENTH. No explosives or goods injurious to the vessel shall be shipped during the currency of this charter party.

SEVENTEENTH. The party of the second part agrees to insure said vessel against total loss for the sum of Twelve Thousand ($12,000) Dollars, at his own cost and expense, in favor of the party of the first part, and to insure said vessel against war risks, including civil commotions, riots, strikes, etc., for the benefit of the party of the first part.

EIGHTEENTH. It is further stipulated and agreed that said party of the second part shall have the option for eighteen months after signing this charter party, of purchasing the said steamer "South Coast" for the difference between the amount of charter hire earned and paid, and the full amount of charter hire designated in this charter party, provided always that said option to purchase shall terminate upon the failure of the party of the second part to comply with the terms and conditions in this charter party set forth, and each and all of them. [17]

IN WITNESS WHEREOF the party of the first part by and through its President, first thereunto duly authorized, has set its hand and affixed its official seal, and the said party of the second part has set his hand and seal this 19th day of June, 1915.

SOUTH COAST STEAMSHIP COMPANY.
By JOHN R. ROBERTS,
President.
HOWARD R. LEVICK, Jr. [18]

Due service and receipt of a copy of within answer is hereby admitted this 29th day of December, 1915.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Filed Dec. 29, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

Testimony Taken in Open Court.

In the District Court of the United States for the Northern District of California, First Division.

Before Hon. MAURICE T. DOOLING, Judge.

No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

Respondent.

SOUTH COAST STEAMSHIP COMPANY, a Corporation,

Claimant.

Proceedings Had March 14, 1916.

Tuesday, March 14, 1916.

Counsel Appearing:

For the Libelant: IRA S. LILLICK, Esq.

For the Respondent and Claimant: MARCEL CERF, Esq., and C. H. SOOY, Esq.

Mr. LILLICK.—If your Honor please, this is an action to recover on behalf of J. C. Rudbac*k*, who is the libelant, certain supplies that are alleged to have been furnished between the 11th of August, 1915, and the 1st day of November, 1915, to the steamer "South Coast," which then was in San Pedro. Mr. Rudbach is a ship chandler at San Pedro. The amount he is seeking to recover is

$1,253.73. As a second cause of action in the libel, there is another claim which has been assigned to Mr. Rudbach from the Marine Hardware Company, amounting to $145.76; that also is for supplies furnished to the steamer "South Coast" at San Pedro. The other day I telephoned to [20] Mr. Sooy and asked him whether he would be good enough to permit the proof that is offered as to the Rudbach claim to apply to the claim of the Marine Hardware Company, because it would necessitate otherwise my bringing from San Pedro someone from the Marine Hardware Company; may I have that stipulation from the other side?

Mr. SOOY.—You had it over the telephone, and it is good here, Mr. Lillick.

Mr. LILLICK.—In addition to that, I have the stipulation from counsel for the claimant, the South Coast Steamship Company, that in the event that the proof we offer here is sufficient to sustain a decree in favor of J. C. Rudbach, that also as a part of the decree that may be rendered by the Court the Court may also find—I shall read from the stipulation:

"In the event that said steamer "South Coast" shall be held under such decree to be liable to J. C. Rudbach for the materials and supplies furnished to her by him, amounting to $1,253.73, as prayed for in said libel of J. C. Rudbach, then, and in that event, and as part of the decree entered in the above-entitled cause, the said decree may, and it shall also provide for the entry of judgment against the said steamer 'South Coast' in favor of the following-named claimants in the amounts specified opposite each of their respective names," and without reading them, there are nine other claimants, whose claims total approximately $800 in addition to the amount sued for in the libel. I desire to file the stipulation, and dependent upon the decree that the Court shall enter in this case a decree may be entered in it for the various amounts specified in the stipulation.

The COURT.—Are you going to have this testimony transcribed?

Mr. LILLICK.—Yes, I think it will perhaps be necessary; I shall need it in the event that a brief is filed. [21]

Testimony of J. C. Rudbach, for Libelant.

J. C. RUDBACH, called for the libelant, sworn.

Mr. LILLICK.—Q. Mr. Rudbach, you are the libelant in this case? A. Yes.

Q. What is your occupation? A. Merchant.

Q. And as such merchant, what character of goods do you deal in? A. In ship chandlery supplies.

Q. Where is your place of business?

A. San Pedro, California.

Q. Do you know the steamer "South Coast"?

A. Yes.

Q. Do you know where she is registered?

A. In San Francisco—she hails from San Francisco.

Mr. LILLICK.—Will it be stipulated that she is registered in San Francisco?

Mr. SOOY.—Yes.

(Testimony of J. C. Rudbach.)

Mr. LILLICK.—Q. Mr. Rudbach, will you state whether or not, between the 11th of August, 1915, and the 1st of November, 1915, the steamer "South Coast" was at San Pedro? A. Yes.

Q. Did you during that period furnish her with any supplies, provisions or necessaries?

A. Yes, I supplied her with considerable supplies.

Q. Captain Rudbach, I hand you a bill dated San Pedro, California, August 11, 1915, for a total of $192.53, and ask you whether or not you delivered to the steamer "South Coast" at San Pedro about August 11, 1915, the various articles mentioned in that bill? A. Yes, they were all delivered.

Q. Who ordered those goods?

A. Captain Roberts.

Q. Who was Captain Roberts?

A. He was at that time the managing owner of the "South Coast," and also captain on that trip.

Q. Do you know what official position he occupied with the [22] "South Coast" Steamship Company, whether or not he was an officer of that company?

A. He was president of the South Coast Steamship Company, I understand.

Mr. LILLICK.—We offer that bill in evidence, and ask that it be marked "Libelant's Exhibit 1."

The bill is marked "Libelant's Exhibit 1."

Q. Captain, I hand you a bill dated San Pedro, California, August 28th, 1915, amounting to $59.75, and ask you whether or not, upon that date or about that date, you delivered to the steamer "South

Coast," at San Pedro, the various goods mentioned in that bill? A. Yes.

Q. I find a second sheet, with the balance of $59.75 carried forward on it, and a total on the two bills of $144.08, and I will ask you whether or not as to the continuation of the other bill, you furnished these supplies to the steamer "South Coast," at San Pedro, California, and whether they were delivered on the vessel?

A. Yes, they were delivered on the vessel.

Q. Upon whose orders?

A. On the captain's orders.

Q. Who was that captain? A. Captain Larson.

Mr. LILLICK.—We ask that these two as one be marked as "Libelant's Exhibit 2," and offered in evidence.

(The bill is marked "Libelant's Exhibit 2.")

Q. Captain, I hand you a bill dated San Pedro, California, September 6, for the sum of $281.09, and ask you whether or not that bill contains a statement of the goods furnished by you to the steamer "South Coast" at San Pedro, California, on or about that date? A. Yes.

Q. Who ordered the goods specified in that bill?

A. Captain Larson.

Q. Who is Captain Larson?

A. He was captain of the steamer "South Coast."

[23]

Mr. LILLICK.—We ask that that be marked "Libelant's Exhibit 3."

(The bill is marked "Libelant's Exhibit 3.")

Q. Captain, I hand you a bill dated San Pedro, California, October 18, 1915, for the sum of $157.09, and ask you whether or not about that date you delivered to the steamer "South Coast" at San Pedro, California the articles mentioned in that bill?

A. Yes.

Q. Who ordered those goods?

A. Captain Johnson.

Q. Who is Captain Johnson?

A. He was master on the steamer "South Coast" at the time.

Q. Were the goods delivered upon the vessel, do you know? A. Yes.

Mr. LILLICK.—We ask that this bill be marked "Libelant's Exhibit 4."

(The bill is marked "Libelant's Exhibit 4.")

Q. Captain, I hand you a bill dated San Pedro, California, October 18, 1915, for $58.96, and ask you whether or not on or about that date you furnished the various articles mentioned in that bill to the steamer "South Coast"? A. Yes.

Q. Were they delivered to the vessel?

A. They were delivered to the vessel.

Q. Who ordered them? A. Captain Johnson.

Q. Who is Captain Johnson?

A. Master on the steamer "South Coast."

Mr. LILLICK.—We ask that that be marked "Libelant's Exhibit 5."

(The bill is marked "Libelant's Exhibit 5.") [24]

Q. Captain, I hand you another bill dated October

(Testimony of J. C. Rudbach.)

18, 1915, for $361.38, and ask you whether or not you furnished the articles mentioned in that bill to the steamer "South Coast" at San Pedro about that date? A. Yes.

Q. Were they delivered on the vessel?

A. Yes, they were delivered on the vessel.

Q. Who ordered them?

A. That bill, I rather think that Mr. Mills ordered.

Q. I notice upon the bill, "O. K., Captain F. M. Johnson."

A. Yes, he O. K.'d it, it was delivered there; to the best of my recollection, I think Mr. Mills gave me that order, to deliver to the "South Coast."

Q. Who was Mr. Mills?

A. He was agent for the steamer "South Coast."

Q. Did he put this O. K. on the bill at your request, Captain?

A. Yes, I furnished him with a copy of the bill, a duplicate.

Mr. LILLICK.—I offer that in evidence as "Libelant's Exhibit 6."

(The bill is marked "Libelant's Exhibit 6.")

Q. Do you know whether the goods mentioned in that bill were delivered to the steamer "South Coast"? A. Yes.

Q. Why were goods ordered by the steamer, if you know, as to whether it was necessary for furnishing the vessel for her trip?

A. That is what I understand, it was necessary for the vessel to go on the trip, on several trips.

(Testimony of J. C. Rudbach.)

Q. Captain, referring to the bill of August 11th, which is the one O. K.'d by Captain Roberts, and amounting to $192.53, who ordered that bill of goods?

A. Captain Roberts.

Q. Captain Roberts was whom, with reference to the South Coast Steamship Company?

A. At that time he was master of the steamer "South Coast." **[25]**

Mr LILLICK.—Will you admit he was president of the South Coast Steamship Company?

Mr. SOOY.—Yes.

Mr. LILLICK.—Q. What, if anything, did Captain Roberts tell you, Captain Rudbach, as to the liability of the steamer "South Coast" for those bills?

A. Well, he came into the store and gave me these articles of goods and told me to give the best price possible, that he will pay for those goods right away; previous to that, I had furnished some goods for the repair of the steamer, the "South Coast," and he told me the other bill I would have to wait for a trip, but this particular bill of goods he would pay right away.

Q. Was Mr. Sooy at San Pedro at that time?

A. Yes.

Mr. LILLICK.—Mr. Sooy, to save time will you stipulate what your connection with the South Coast Steamship Company was at that time?

Mr. SOOY.—I think I was secretary and also attorney, and possibly part owner.

Mr. LILLICK.—Q. What, if anything, did Captain Roberts tell you about where you should get your money for those goods?

A. Well, after the goods were delivered, it was late in the evening, I went over with the bills to see Captain Roberts, and he took the bills and checked them over very carefully, and then he took and O. K.'d the bills and told me to go to Mr. Mills, that he had left the money with Mr. Mills to pay me; it was then pretty late in the evening, and I think Mr. Sooy was present at the time.

Q. Then what did you do?

A. Next morning I went to Mr. Mills, there, and told him what Captain Roberts had told me, that he had left money there to pay that bill. **[26]**

Q. What did he say?

A. He kind of laughed and he said, "Is that what he said"? And I said, "Yes," and he said, "Well," —he jokingly said, "He is a darned liar, he didn't leave anything here."

Q. Now, subsequent to that the vessel left San Pedro on a trip? A. On a trip.

Q. When she returned, did you make any demand upon Captain Roberts for the amount of these bills?

A. Yes, I went right over to see him about it, and he made several excuses, he didn't have enough money there, that he did not have very much money left over, and he wanted to take as much money as possible to Mexico, that he might need it down there, but he would see to it I would be paid right away; I believe he mentioned that Levick and Oliver would pay the bills.

(Testimony of J. C. Rudbach.)

Q. Did you have any conversation with Captain Roberts, president of the South Coast Steamship Company, as to whom you were holding responsible for the payment of these bills?

A. Yes, I had several times conversations; he always admitted that the steamer "South Coast" would be responsible for the bills; he told me so.

Q. Captain, subsequent to that, and after all of these bills had been incurred, did you have any conversation with Captain Roberts about the payment of the bills?

A. Yes, I told him every time I *saw in* San Pedro, the ship was there, I said the bills were not paid yet, and I needed the money to carry on my business, and he says, "I am more anxious than you are to see those bills paid, because I am responsible for them, and I will see they will be paid, don't worry about it, you will get your money."

Q. You say he said, "I am responsible for them." Did he say anything [27] to you about the responsibility of the steamer "South Coast"?

A. He meant the steamer "South Coast."

Q. You say he meant it? A. Yes.

Q. How do you know that?

A. He said the steamer or owners of the steamer will be responsible for the bills.

Q. Are you sure he said the steamer will be responsible for the bills?

A. To the best of my recollection, yes.

Q. Captain, after the filing of the libel, had you any conversation with Captain Roberts as to the liability of the steamer "South Coast" for those bills?

A. Yes.

Q. What did he say?

A. Well, he accused me, that I was hasty in libeling the ship there and adding expense, and I told him I could not wait forever to get those bills paid, and I went up to San Francisco and sent the bills to Mr. Sooy, and he told me he would not pay them, or the South Coast Steamship Company would not pay them; and he made the remark, "Well, Mr. Sooy is an attorney, and he wants his lawsuits and litigation, and Lillick is the same way; "If I had been in San Francisco," he said, "this thing would not have happened."

Q. Do you know whether at that conversation he made any remark about the liability of the steamer, itself; for the bills?

A. Yes, he said, "You were afraid you would not get your money out of the ship."

Q. Captain, do you know whether both Captain Roberts and Mr. Sooy knew that you were furnishing these supplies to the steamer "South Coast"?

A. Yes.

Q. Do you remember whether you ever told Mr. Sooy that you were intending to hold the vessel responsible for the bills?

A. No, I don't remember ever having any conversation with Mr. Sooy. **[28]**

Q. Do you know whether the supplies that you furnished were necessary at that time for the operation of the steamer "South Coast"?

A. To the best of my knowledge, I think they were necessary.

Q. Had you furnished supplies for her before?

A. Yes.

Q. Had they been paid for? A. Yes.

Q. How had you charged those other supplies?

A. To the steamer "South Coast" and owners.

Q. Would you have supplied any of these articles that you did to the vessel on anything but the credit of the vessel?

A. No. In making the first deliveries of supplies, I specially stipulated that I would not sell to anybody else but the ship and the owners.

Q. Did you ever receive any notice of any kind or character from either Captain Roberts or Mr. Sooy, before you furnished these bills, that the vessel, itself, was not responsible for them? A. No.

Cross-examination.

Mr. CERF.—Q. How soon after Captain Mills said that Captain Roberts was a darned liar, or damned liar, whatever he said, did you see Captain Roberts?

A. I should judge about a week or so, when he came back on the trip.

Q. Didn't you see him afterwards, and before he went on the trip to Ensenada?

A. Yes, I saw him before, and I saw him after.

Q. I mean after you saw Captain Mills and Captain Mills told you that Captain Roberts was a damned liar did you see Captain Roberts before he went to Ensenada?

(Testimony of J. C. Rudbach.)

A. No, he was on his way to Ensenada at that time.

Q. When Captain Roberts came back from Ensenada, did you tell him that Mills said he was a damned liar? A. No.

Q. What did you tell him about the conversation you had with [29] Mills?

A. Well, I told him, I said, "You told me to go to Mills, that you had left money there, and Mills says you didn't leave a cent there," and he kind of made excuses, he did not have very much money, and he needed to take money to Mexico, and I said, "That is no way to treat a person, trying to put one over on him."

Q. You really thought he was trying to put one over on you? A. Yes, that is what I thought.

Q. You honestly believed that he was trying to decieve you at that time?

A. Yes, while he was on the trip there; when he gave me the excuses he made after he came back, I thought it might be all right.

Q. What excuses did he make?

A. That he didn't have very much money, and he thought he might need it all in Mexico.

Q. Anything else?

A. No, I don't remember anything else.

Q. You did not lose such confidence in him that you refrained from extending further credit to him thereafter, did you? A. No.

Q. Notwithstanding what Mr. Mills told you about his being a damned liar?

A. I didn't take that very seriously, as I said; Mr.

Mills said that more in a joking way.

Q. Just a joke? A. Well, kind of, yes.

Q. Then, as a matter of fact, you didn't think he was trying to put something over on you; you thought that was a joke?

A. No—I did think he was trying to put one over on me.

Q. Notwithstanding you thought he was trying to put something over on you, you continued to extend credit to him to the extent of about a thousand dollars? A. Yes.

Q. Now, as a matter of fact, Mr. Rudbach, the day that Captain Roberts ordered these goods from you was by no means the first day that you had any transaction connected with the "South **[30]** Coast," was it? A. No.

Q. Certainly not? A. No.

Q. For a period of several months you had been furnishing goods to the "South Coast," hadn't you?

A. I don't know whether it was several months, but I suppose it was one or two months, anyway.

Q. Two months, anyway? A. Yes.

Q. Do you remember the first time that you were asked to supply materials to the "South Coast"?

A. Yes.

Q. You remember the place? A. Yes.

Q. You are sure you remember the place?

A. Yes.

Q. It was at a restaurant, was it not? A. No.

Q. Are you sure it was not? A. No.

Q. Do you remember of having met a man by the name of Levick? A. Yes.

Q. Do you remember the first time you met Mr. Levick? A. Yes.

Q. Are you sure you do? A. Yes.

Q. Who presented Mr. Levick to you?

A. Mr. Mills.

Q. Where was it?

A. I think that was in a restaurant.

Q. Keep that in your mind for a minute. You were sitting down, Captain Mills was sitting down, and Levick was sitting down?

A. No, I was not sitting down.

Q. You were standing up; you were in the restaurant, anyway? A. Yes.

Q. I want you to tell the Court what Mr. Mills said to you when he presented Levick to you—about furnishing supplies and materials to the "South Coast."

A. He didn't say anything that I remember about supplies at that time.

Q. Just press your recollection a little bit.

A. To the best of my recollection, I was sitting in the restaurant **[31]** at another table, when I saw Mr. Mills over there, and I had supplied the "South Coast" with some stuff already, and I went over to Mr. Mills and asked him at what time they expected the "South Coast" to get away, and Mr. Mills said, "I don't know; as soon as she gets ready," and at that time he introduced me to Mr. Levick, and I told Mr. Levick, I believe, I was in the habit of, that I was supplying the ship at that time, and the conversation drifted along there about supplies that she would need when she started out, and I told him I was in a position to supply the ship with all the necessaries that he needed.

Q. Whom did you say that to?

A. I said that to Mr. Mills and Mr. Levick.

Q. Of course, there was no occasion for your saying it to Mr. Mills; you had known Mr. Mills for many years? A. Yes.

Q. You said it to Mr. Levick, then? A. Yes.

Q. Why did you say it to Levick?

A. At that time, Mr. Mills said Mr. Levick was operating the ship, and that probably he would be buying those goods.

Q. That was the time when Mills told you that Levick was operating the "South Coast"?

A. Yes.

Q. And that probably he would require some goods and some supplies? A. Yes.

Q. Now, you solicited the business, naturally, from Levick? A. No.

Q. Of course, you were not adverse to furnishing the materials?

A. I did not furnish anything to Mr. Levick.

Q. We will let the Court decide that, Mr. Rudbach. You said to Mr. Levick that you were in the business of furnishing supplies to ships? A. Yes.

Q. And you told him that you would like to furnish supplies to the "South Coast"? A. Yes.
[32]

Q. You told that to Mr. Levick? A. Yes.

(Testimony of J. C. Rudbach.)

Q. Knowing Mr. Levick was operating the "South Coast"? A. Yes.

Q. What did Mr. Levick say?

A. Mr. Levick said, "It will all depend upon the price," that he would give me a chance to figure on it.

Q. Anything else?

A. Nothing that I remember.

Q. You probably said you would make the price right; you would do as well as you could?

A. Probably I did.

Q. As a matter of fact, you were anxious for the business, were you not?

A. Yes, I was anxious for the business.

Q. How long had you known the "South Coast" at this time?

A. Well, about probably three or four months, something like that.

Q. Never had heard of the ship before that?

A. Oh, yes; I have known the ship, the "South Coast," for a number of years.

Q. That is what I mean, you have known her for quite a number of years? A. Yes.

Q. During this period of a number of years, did you know who her owner was?

A. No, not exactly.

Q. What do you mean by "not exactly"?

A. I did not know exactly who her owners were until I inquired from Mr. Mills and Captain Larson.

Q. During this period of several years, you didn't know who owned the "South Coast"?

A. No, I did not.

Q. You did not find that out until you asked Captain Mills and Captain Larson? A. Yes.

Q. Whom did you ask first, Mr. Mills or Captain Larson? A. Mr. Mills.

Q. When did you ask him that?

A. As soon as the "South Coast" arrived down in San Pedro for repairs.

Q. That was the time that Mr. Mills gave you a little order [33] for $5 or $6 worth?

A. No, he gave a considerably bigger order.

Q. A bigger order than that, was it?

A. Yes. I could relate the conversation.

Q. It was the first order anyway?

A. Yes, he gave me the first order the following day; he did not give me any order at that time; I went over there to solicit the order, but he did not give me any order at that time, but he telephoned to me an order the next day or the day following.

Q. This is what I am getting at: The day that you went over to solicit business from Mills, Mills told you that the South Coast Steamship Company was the owner of the "South Coast"? A. Yes.

Q. There is no question about that, is there?

A. No. I don't remember whether he said the "South Coast Steamship Company," but he said Roberts and Sooy—he mentioned Mr. Sooy's name—are the owners.

Q. Roberts and Sooy? A. Yes.

Q. He did not say anything about any company at all?

A. About the South Coast Steamship Company?

Q. Yes.

A. I can't remember that; I have no recollection; I could not swear; he may have said it and he may not.

Q. But you do remember that he said Roberts and Sooy? A. Yes, I do remember that.

Q. That was the day that you solicited the business from Mills? A. Yes.

Q. You did not get any business, though, from him, did you? A. No, not that day.

Q. You never had met this man Levick up to that time, had you?

A. I did not meet him at that time; I did not meet him until a week or a couple of weeks later. **[34]**

Q. A couple of weeks later was the first time you ever met him? A. Yes.

Q. That was the first time that you knew that Levick was in charge of the operation of the boat?

Mr. LILLICK.—Objected to upon the ground the witness has not testified that Levick was in charge of the boat, and assuming a fact not in evidence.

The COURT.—That was not the exact language he used, but he did say that—what was it they told you, that Levick was operating the boat?

A. Yes, that he was going to operate the boat.

Mr. CERF.—At this conversation at the restaurant, Mr. Mills told you that Mr. Levick was the man who was going to operate the boat?

A. Yes.

Q. And then you turned to Levick and told him that you would like to furnish the materials and supplies? A. Yes.

Q. Now, this is the situation, isn't it, Mr. Rudbach: Before you met Levick, Mills had told you, you believe, that Roberts and Sooy were the owners of the boat? A. Yes.

Q. And when you did meet Levick, you were told by Mr. Mills that Levick was the man who was operating the boat? A. Yes.

Q. Mr. Mills did not tell you, as far as you remember now, that the owner of the boat was a corporation, did he?

A. No, I don't believe that he ever told me.

Q. Who was the first man that told you that the owner of the "South Coast" was a corporation?

A. Captain Larson.

Q. Are you sure it was Captain Larson?

A. Yes.

Q. You are absolutely positive about that?

A. That is the best of my recollection, positive almost.

Q. If you remember it, you must remember the fact of his saying so and perhaps you remember where it was he told you? [35]

Mr. LILLICK.—Objected to as argumentative, and a compound question.

Mr. CERF.—I will withdraw it.

Q. Do you, as a matter of fact remember that Captain Larson did tell you that the owner of the "South Coast" was the South Coast Steamship Company?

(Testimony of J. C. Rudbach.)

A. Yes, and that Captain Roberts was the president.

Q. Do you remember where that was, when he told you that? A. That was in my store.

Q. Do you remember when it was?

A. Well, he was up there giving me an order for some goods, and that is the time I asked him who owned this vessel.

Q. There is no doubt about that, either?

A. No.

Q. He told you the owner of the vessel was the South Coast Steamship Company, and that Captain Roberts was the president? A. Yes.

Q. And he told you that on the day he ordered some goods?

A. Yes, he ordered some goods that day.

Q. You are sure about it? A. Yes.

Q. Which goods were they?

A. Well, they are not goods that are in these bills; that was goods that were bought previously, which were paid for.

Q. You are sure of that? A. Yes.

Q. These goods have all been paid for?

A. Yes.

Q. Who paid you? A. Mr. Mills.

Q. Do you know where he got the money to pay you for them?

A. I rather think he got it from the Pacific Warehouse and Storage Company; it was a check.

Q. You know what I mean, Mr. Rudbach?

Mr. LILLICK.—I object to that insinuation of counsel, if your Honor please. **[36]**

Mr. CERF.—I beg your pardon, Mr. Rudbach, and Mr. Lillick's. I will withdraw that. Let me ask you: Do you know whether or not the money that he gave you to pay you for the goods that were ordered by Larson was the money which he got from Levick?

A. Well, I don't know, but perhaps he did.

Q. Just tell me what your best judgment is in the matter.

A. It is my judgment, I rather think he did, but I would not swear to that that he did; I don't know whether he did.

Q. Upon what do you base your judgment in that regard? What makes you think he got the money from Levick?

A. In fact, I don't think he did get it from Levick.

Q. What do you think about it?

A. I rather think he got it from somebody else on notes.

Q. Whose notes?

A. I don't know; I never saw them; just at different times in conversation, I got this opinion, but I don't know a great deal about it; I don't know very much.

Q. Your judment is that it was Levick's money that paid you for the goods?

A. No, it is not my judgment that it was Levick's money; I think it was somebody else's money.

Q. Were you mistaken a moment ago when you said it was your judgment that it was Levick's money? A. I was mistaken if I said so.

(Testimony of J. C. Rudbach.)

Q. What position did Mr. Mills occupy with respect to this ship, do you know?

A. He was acting agent for the steamer "South Coast."

Q. Did he tell you so at the time that you had the conversation about Levick? A. No.

Q. When did he tell you so?

A. He told me when the steamer first arrived at San Pedro.

Q. Did he tell you for whom he was acting as agent?

A. For the steamer "South Coast." **[37]**

Q. Did he tell you he was to operate the "South Coast"? A. Yes.

Q. What did you say?

A. I went over there, as I said, to solicit business, as I understood that Mr. Mills was agent for the steamer "South Coast"; for that reason I went over to him; when I went over, he told me then that Captain Roberts and Sooy had asked him to look after the boat, and he told me that Levick and Oliver were going to operate her, and that Sooy had written him not to have any bills go on the ship's account, that Levick and Oliver will pay those bills; I told him it was immaterial to me who paid those bills, but I would not sell my goods to the ship any other way than charging them to the ship or her owners, and if he did not want it that way I would not deliver any goods.

Q. Now, as a matter of fact, did Mr. Mills at that time read to you or show to you a letter that he had from Mr. Sooy? A. No.

Q. He did not?

A. No. He pulled out, to the best of my recollection, from the pigeon-hole a letter, but he didn't give it to me to read, and he didn't read it before me; I didn't know what the contents were.

Q. But he told you that Mr. Sooy and Captain Roberts, the owners of the vessel, insisted that if any materials or supplies were furnished to the vessel, they should be furnished on the credit of the people who were going to operate her, Levick and Oliver?

A. Yes.

Q. He told you before you ever furnished a cent of material to that vessel?

A. Yes, but he withdrew that the next day.

Q. But he told you that Captain Roberts and Sooy had told him that?

A. That Mr. Sooy had written to him.

Q. That Levick and Oliver had a charter on the vessel? A. Yes.

Q. Did he show you a copy of the charter-party?

A. No.

Q. Did you ever see a copy of the charter?

A. Not until the [38] other day, in Mr. Lillick's office.

Q. Did you ever ask Mills to show you a copy of the charter-party? A. No.

Q. Did you ever ask Captain Roberts to show you a copy of the charter-party? A. No.

Q. Did you ever ask Mr. Lillick to show you a copy of the charter-party? A. No.

Q. Did you ever ask Mr. Sooy to show you a copy of the charter-party? A. No.

Q. Did you ever ask Captain Larson to show you a copy of the charter-party? A. No, but—

Q. (Intg.) Did you ever ask anybody?

Mr. LILLICK.—I submit that the witness should be allowed to finish his answer.

The COURT.—Yes.

A. I asked Captain Larson whether he knew who the ship was chartered to, and he told me no, he didn't know, that he didn't have a copy of the charter-party.

Mr. CERF.—Q. Was that upon the same occasion that he told you that Captain Roberts was the president of the South Coast Steamship Company?

A. Yes, that was the same occasion.

Q. That was before any of the goods were ordered for which the bills are now in court? A. Yes.

Q. Then, as a matter of fact, Mr. Rudbach, the first time that you knew that Levick, or Levick and Oliver were interested in the operation of this steamship was not the day that you met Levick in the restaurant, but the day that you went over to Captain Mills to solicit the business? A. Yes.

Q. It was on that day that you knew that the operation of the steamship was in the hands of the charterers, Levick & Oliver?

A. Yes, that is what I understood from Mr. Mills, that Levick [39] & Oliver had chartered the ship.

(Testimony of J. C. Rudbach.)

Q. Did you understand who were to be the agents of these charterers Levick & Oliver?

A. No; I did not make any further inquiries; I didn't know who Levick was, anything at all.

Q. This is what I want to explain: If you went to Mills to get the business, and Mills told you that the ship was under charter to Levick & Oliver, or to Levick, and you persisted in soliciting the business from Mills, then you considered, did you not, that Mills was the agent of Levick & Oliver?

Mr. LILLICK.—Objected to upon the ground it is not binding on the libelant, and irrelevant, immaterial and incompetent.

Mr. CERF.—My object entirely in asking that question is to find out what was in the mind of the libelant.

The COURT.—The objection will be overruled.

Mr. CERF.—Q. Do you understand the question?

A. Yes. I wish you would repeat the question.

(Last question repeated by the reporter.)

A. No, when I went to Mills, I did not know that he was agent.

Q. I understand—

Mr. LILLICK.—Pardon me. The witness is not through with his answer. Let him finish.

A. (Continuing.)—All that I knew was that he was agent for the steamer, and I went to solicit business from the steamer, consequently I went to him, and after we talked things over, it would be necessary for me to explain, to state the conversation at that time; it might be more clear.

(Testimony of J. C. Rudbach.)

Q. Go on, give us the conversation.

A. When I spoke to Mr. Mills at that time and told him I would not sell the goods to anybody else, to the charterers, Levick & Oliver, or whoever [40] it might be, that I would sell it to the ship, and hold the ship and owners responsible, Mr. Mills told me that Mr. Sooy and Mr. Roberts could not expect otherwise, that anybody would furnish goods to anybody that they did not know, and that the ship will have to be responsible for them. At any rate, he said, "I won't do anything until Roberts gets here; I expect him here in a day or so, and I will tell him to come up and take the matter up with you." Then the next day, or the day after, he telephoned to me to send over some oakum, I believe the carpenters were there working, and he said, "Charge this to the ship, and if Captain Roberts wants it otherwise, he can take it up with you," and that is the way the business started.

Mr. CERF.—Q. Mills told you to charge it to the ship? A. Yes.

Q. You are sure about that? A. Yes.

Q. That was the first order you got?

A. That is the first order I got.

Q. So, with respect to the first order that you got, you are perfectly sure that you depended exclusively upon the ship? A. Yes.

Q. No doubt at all about that?

A. No doubt at all.

Q. Don't you remember that Mr. Mills, himself, guaranteed payment of that first bill?

(Testimony of J. C. Rudbach.)

A. He might have; yes.

Q. Don't you remember that he did?

A. I don't remember; I don't know.

Q. You don't remember that he guaranteed payment of that, but you know he said to charge that to the ship? A. Yes.

Q. And you looked to the ship for your payment?

A. Yes.

Q. You must remember he didn't guarantee it, don't you?

A. I could not swear to it; he might have guaranteed that, or [41] said if Roberts did not want to pay for it, he would pay for it, or something to that effect, but I don't remember.

Q. You don't remember anything like that?

A. No.

Q. But you do remember that he told you about charging it to the ship? A. Yes.

Q. Do you remember the first time you met Mr. Sooy?

A. It was somewhere about that time, when the steamer was getting ready to go to Ensenada.

Q. Have you a picture of Mr. Sooy coming into your shop?

Mr. LILLICK.—That is objected to, if your Honor please.

The COURT.—Ask him the question. It does not make any difference whether he has a picture of him, or not.

A. I believe Mr. Sooy was in the store.

Mr. CERF.—Q. Was that the first time you ever met Mr. Sooy?

A. That is the first time I ever met him, that I ever saw him.

Q. The first time you ever saw him was in your store, was it not? A. Yes.

Q. Do you know what time of day or night it was?

A. No, I can't remember, I don't know; I remember he was in there with Captain Roberts, to the best of my recollection.

Q. Do you remember whether it was before or after you had delivered the goods to the "South Coast" this first bill which has been introduced in evidence here? A. I rather think it was before.

Q. Let me see if I cannot refresh your recollection in that regard: Don't you remember that Mr. Sooy came to your shop, and that the goods were all packed, ready to be sent over to the "South Coast"? A. Yes, maybe they were.

Q. Don't you remember it, Mr. Rudbach?

A. Yes, I think they were. **[42]**

Q. That is a fact, isn't it? A. Yes.

Q. The goods were there in your store, and Mr. Sooy came over? A. Yes.

Q. Do you remember what Mr. Sooy said to you about these goods?

A. He didn't say anything to me.

Q. Are you sure about that? A. Positive.

Q. I am going to put this question to you: I want to know if on that occasion, you and Mr. Sooy and Captain Roberts being present, Mr. Sooy did not say to you, in substance or effect, "Now, Mr. Rudbach, in order that there may never be any misunderstanding about these goods, I want you to know that you are not to deliver them to that ship unless you are looking to Levick & Oliver for their payment"?

A. Absolutely not.

Q. You are sure about that?

A. I am positive about that. I never spoke a word to Mr. Sooy; I do not believe, all the time he was in San Pedro, to my recollection—yes, I did; I think the only words I ever spoke to him were when I had a little lunch down in the cabin aboard the "South Coast"; I never have been introduced to Mr. Sooy to this date, and I didn't know who he was; I know he was along with Captain Roberts, but I didn't know that was Sooy, or the Sooy that Mr. Mills had reference to until I asked Captain Larson, and he told me that it was Mr. Sooy, a partner of Captain Roberts.

Q. Captain Larson told you it was Mr. Sooy?

A. Captain Larson; I didn't know that was Mr. Sooy when he was in with Roberts at the time; I think there was some conversation that I had with Captain Roberts about some rope that he had bought in San Francisco, that I told him I could have sold him as cheap in San Pedro as he bought it in San Francisco, and paying the freight down there, and he says, "I didn't know you had two coils of such large rope in stock, and Henry is a very good friend of **[43]** mine, and I ordered from Henry."

Q. Anything else at that time that was talked about? A. Not that I remember.

Q. You don't remember anything else was talked over at all on that occasion? A. No.

Q. What did Captain Roberts and Mr. Sooy come into your store for?

A. I don't know; probably Captain Roberts came in there and put a little addition to the order, or something of that sort.

Q. Now, these goods were all ready to go on the ship?

A. Yes, and as is very often the case, they forget something and come in and order a little more.

Q. You have no recollection of anything that was done, at that time, except the fact that you chided Roberts for having ordered rope from Henry instead of you?

A. Yes, it kind of impressed me, having had quite a little bit of business there, that I felt I ought to have it.

Q. When did you first find out that that rope had come down there?

A. I saw it aboard the steamer.

Q. When?

A. Over at the "South Coast," over across the bay.

Q. I want to know when it was you saw that rope on the "South Coast"?

A. Captain Roberts, whether he telephoned to me or asked me that morning to go over there, I don't remember, but he wanted me to look over the lifeboats, which were just about to be inspected, and to go over there and look over the life-boats and see that there was everything that was necessary to equip the life-boats to pass inspection, an oar or such a thing, so he wanted me personally to go over there and see about these things, and I went over, and that is the time I found the rope there, and at that time he gave me some order, and he asked me also to get an electrician for him there, saying, "Old man, you will do **[44]** that for me, and I will remember you," and so forth.

Q. Was that before he had given you the order for these goods?

A. It may be it was before or it may be it was after; it was about that time; I couldn't remember.

Q. Was it before?

A. It was just about that time.

Q. As a matter of fact, how many days before these goods were delivered aboard the ship did Captain Roberts order them?

A. I guess he ordered them one day and I guess they were delivered the next day, if not the same day.

Q. Have you any recollection in that regard, any positive recollection?

A. I am positive it was not very long.

Q. Between the order and the delivery?

A. Yes. It was not very long between the order and the delivery. I think they came in there in the evening and gave me the order, and it was delivered the next day.

Q. That is your recollection of it? A. Yes.

(Testimony of J. C. Rudbach.)

Q. And it was before you got that order from Captain Roberts that you saw this rope aboard the ship, was it?

A. Yes; it must have been; I was over there.

Q. At the time that Captain Roberts gave you the order, he came over to your store and gave it to you?

A. Yes.

Q. You did not chide him at that time for having failed to give you the order for the rope, did you?

A. No.

Q. It was not until the next day, at least the next night, that he came with Mr. Sooy, that you talked to him about the rope?

A. Well, that might have been the next night, and it might have been the day before; I don't know; I couldn't remember now the exact date or the day; I know it was just about that time.

Q. You know that you did not talk to him about the rope when Mr. Sooy was there, don't you?

A. Yes.

Q. You know that he gave you the order before Mr. Sooy was there, **[45]** don't you, because it was already made up?

A. I don't know whether Mr. Sooy was in San Pedro at that time.

Q. Before he was in your store?

A. He might have been in San Pedro, I don't know.

Q. But in your store, I am talking about; as I understood your testimony, Captain Roberts and

(Testimony of J. C. Rudbach.)

Mr. Sooy came into your store casually one evening, and went—

Mr. LILLICK.—I object to the word "casually."

Mr. CERF.—Came into your store one day?

A. Yes.

Q. And all you remember of the conversation was that you complained, or rather suggested to Captain Roberts that he might have given you the order for the rope, instead of to Henry? A. Yes.

Mr. LILLICK.—The witness also testified that he was absolutely positive that Mr. Sooy did not say at that time, "You are not to look to the vessel for these goods." Counsel has put into the witness' mouth by this question the fact that is all he remembers. The witness' attention has not been called to the other statement he made; he has absoluely denied that Mr. Sooy made that statement. I think the question is misleading.

Mr. CERF.—Q. You remember, Mr. Rudbach, that when Captain Roberts and Mr. Sooy came into your store, that the only thing that was discussed was the rope?

A. There might have been other things discussed.

Q. But that is the only thing you remember?

A. That is the only thing I remember with regard to; he might have spoke of little things, or something of that sort.

Q. But you cannot remember that? A. No.

Q. You know that at this time that Mr. Roberts and Mr. Sooy were there, when you talked about the rope, that was subsequent [46] to the time that Captain Roberts had given you the order?

A. It might have been, I don't know.

Q. You told me, did you not, a little while ago, that the order was all made up on the floor of the store ready to be delivered when Captain Roberts and Mr. Sooy came in.

A. I didn't mean to say that the stuff was ready in there; you told me that the stores were made up; I said they might have been; I don't remember. They might have been made up at that time; I don't remember exactly whether that was said before he gave me the order or after, but it was just about that time.

The COURT.—The important thing is the fact that Mr. Sooy told him this, whether it was before the order was given, or before the goods were delivered.

Mr. CERF.—Q. Captain Rudbach, will you tell me how close to the "South Coast" your store—how close to the place where the "South Coast" was lying is your store? A. It is quite a distance.

Q. Quite a considerable distance, is it not?

A. Yes, it is across the bay.

Q. As a matter of fact, you have to take the ferry boat to go over there, don't you? A. Yes.

Q. You have to go over a sand spit? A. Yes.

Q. And it is a rather inconvenient thing for a big man to go from where the "South Coast" was lying?

A. It is quite a considerable walk, it is a board walk.

(Testimony of J. C. Rudbach.)

Q. You have to take the ferry boat, also?

A. Yes; that is just a little trip across the channel.

Q. Are you just as positive now as you were a little while ago, that Mr. Sooy did not—

A. (Intg.) I am absolutely positive, I do not believe I ever exchanged a word with Mr. Sooy outside, as I said, of that cabin, when we were having a little **[47]** lunch.

Q. Then you did have lunch with him in the cabin of the "South Coast"?

A. Yes, that is that evening that he left for Ensenada.

Q. That was the evening of the night that they left for Ensenada? A. Yes.

Q. That was after your goods had been delivered?

A. Mr. Sooy made some casual remark about sailors getting drunk, and it being hard to get a crew, but there was nothing mentioned about business either way.

Q. When Sooy came into the store with Roberts, didn't Roberts present his friend Sooy to you?

A. No.

Q. Didn't introduce him at all?

A. No, that is what I said before, I have never been introduced to this day to Mr. Sooy; I didn't know who Mr. Sooy was.

Q. By lunch, you mean something to eat?

A. Something to eat; it was late in the evening when I brought these bills over there, and Roberts says, "Have you had something to eat," and I said, "No," and he said, "Go down and get something to eat"; they were having supper, and I went down and had a little to eat.

Q. That was the time you talked with Mr. Sooy?

A. Mr. Sooy was sitting at the table at the time.

Q. These payments that you got for the goods that were paid for, and that were delivered to the "South Coast," were payments made in the form of checks? A. Yes.

Q. By Captain Mills in every instance?

A. Mr. Mills.

Q. Mr. Mills in every instance? A. Yes.

Q. Mr. Rudbach, did you ever present a bill to the South Coast Steamship Company for any of these goods?

A. I presented them to Captain Roberts, the president of the South Coast Steamship Company, and he told me to bring it over to Mr. Mills. [48]

Q. Beside the bill that Captain Roberts put his name on and told you to take to Mr. Mills, did you ever present any bill to Captain Roberts?

A. Outside of this, no; he told me to leave it to Mr. Mills; the captain told me to bring it over to Captain Mills and he will take care of it.

Q. So that outside of the bill you gave to Captain Roberts to put his name on, and which he did put his name, and which he told you to take to Mr. Mills for payment, you never presented any bill to Mr. Roberts? A. No.

Q. Nor Mr. Sooy? A. No.

Q. Nor to anybody else connected with the South Coast Steamship Company?

(Testimony of J. C. Rudbach.)

A. Except their agent, Mr. Mills, and the captain.

Q. The captain and Mr. Mills?

A. Yes. I didn't know where the South Coast Steamship Company's headquarters were.

Q. You didn't know that? A. No.

Redirect Examination.

Mr. LILLICK.—Q. Captain Rudbach, are you absolutely positive that Mr. Sooy did not tell you that the vessel would not be responsible for these bills?

A. I am absolutely positive of that.

Q. You are under oath; this is a very serious thing.

A. Well, I am absolutely positive that I never spoke to Mr. Sooy until that time in the cabin aboard the "South Coast," as I told you; I was never told by anybody that the ship would not be responsible for them, excepting that conversation with Mr. Mills, at the first time, and later on, Captain Larson spoke about it, made reference to it.

Q. Mr. Sooy and Captain Roberts did come in your store that evening there at San Pedro, did they?

A. I don't know whether it was the evening or afternoon; it was about that time they came in there, and Captain Roberts gave me some more orders, **[49]** or I believe there was something he came in for, and I talked to him.

Q. Did you have a conversation with Mr. Sooy at all on that occasion? A. Not at all.

Q. You recognize Mr. Sooy sitting here at the table as the gentleman who was in there with Captain Roberts? A. Yes.

(Testimony of J. C. Rudbach.)

Q. What were Mr. Sooy and Captain Roberts doing upon that vessel then, Captain?

A. Well, I did not see very much of Mr. Sooy on the vessel there, and several times I went over; whenever I saw Captain Roberts, he was going around there and fixing up things, and ordering hands around like naturally a man connected with a ship would do, an owner.

Q. What did Captain Roberts tell you they were going to do with the steamer on that trip to Ensenada?

A. They would not tell me anything; they did not tell me anything.

Q. What were they doing, if anything, upon the chartered vessel going down there, if they were not interested in it?

A. I don't know; it was kind of kept secret; they did not tell me what they were going for; they told me they were going on a short trip and would be back in about a week.

Q. The vessel was being repaired at that time, was she not? A. Yes, she was completed.

Q. Who was superintending these repairs?

A. Captain Larson, he was around there, and other times Captain Roberts was there, he was superintending it, as I seen whenever I went over there.

Q. By "superintending," what do you mean? What was Captain Roberts doing about the repairs?

A. Of course, I was not over very much; occasionally I had to go over there, and I saw him ordering hands around and telling them what to do, the carpenter, the men that were working on board.

Q. Do you know whether Mr. Sooy had come down with the "South [50] Coast" when she was towed down? A. How is that?

Q. Do you know whether he came on the steamer "South Coast," or whether he came down by train?

A. No, I did not see Mr. Sooy for a long time afterwards, until she was almost ready to go to sea; as I said, it was a day or so before she went to Ensenada.

Q. At any rate, Mr. Sooy and Captain Roberts went out with her on that trip down to Ensenada?

A. I could not swear to that; I think they did.

Q. And Captain Roberts at that time was captain of the vessel, as well as being the president of the steamship company? A. Yes.

Q. You were asked upon your cross-examination about a conversation that you had with Mr. Mills when counsel asked you about a letter, and Mr. Mills calling your attention to a letter; you testified that you had not had that letter read to you; in one of your replies you said, he withdrew that notice the next day. What do you mean by that?

A. Well, he said that he would not order any goods until Captain Roberts came down and he had seen him, and he would take it up with me himself.

Q. He told you that he had received a letter from Mr. Sooy?

A. Yes, he had received a letter from Sooy, saying they didn't want to have anything charged to the ship, and when I explained to him I would not sell any goods otherwise unless they were charged to the ship and owners, he said, "Mr. Sooy and Mr. Roberts could not expect anything otherwise," but he said, "I won't order anything at this time, but Captain Roberts will be down in a day or so, and he will take it up himself"; the next day he telephoned to me to send over oakum, and to charge it to the ship, and if Roberts wanted to do otherwise he could take it up with me.

Q. What, if anything, do you know about Mills having acted [51] there as the representative of Captain Roberts or Mr. Sooy on the steamer "South Coast"?

A. Well, Mr. Mills told me that Sooy had written to him and told him to look after the "South Coast."

Q. Did he while the "South Coast" was at San Pedro look after her and see about the repairs?

A. Yes, sometimes he ordered the goods, he telephoned, and other times the captain came in and ordered them; other times Captain Roberts ordered them.

Q. And he told you that Roberts and Sooy had asked him to look after the boat, didn't he?

A. Yes.

Q. After the return of the "South Coast" from Ensenada, when you saw Captain Roberts about the bills that he said he had left the money with Mills to pay you for, what did he say to you about the liability of the steamer "South Coast" for that bill?

A. Well, he said that I need not worry, that would be all right, I would be paid for it, that he was at that time short of money, and he did not have any money to pay for it, but it would be all right, it would be paid.

Q. Did you charge Captain Roberts with the trick he had played upon you in telling you that the money would be at Mills' for you? A. Yes.

Q. What did he say?

A. "Well," he says, "old man, you don't understand these things; you see I did not have very much money to go down to Mexico, and I thought probably I had better take it along with me, I might need it, and you will get paid, I will see that you get paid for it," or that Levick & Oliver will pay it.

Q. What did Captain Roberts say, if anything, to you, about going to Ensenada?

A. He did not tell me anything about going to Ensenada.

Q. Did you hear anything about a cargo of ties that would be **[52]** brought back?

A. I believe Mr. Mills spoke something about a cargo of ties, that the ship was going to Mexico and would bring back ties.

Q. Didn't you ask Roberts what he was going down to Mexico for—did you say anything to him about that at all?

A. No, I don't remember of ever asking him anything; I could understand that he did not want to say anything regarding his trip, and I didn't question him very much; I thought it was none of my business to know where the ship was going.

Q. Do you remember an occasion when Captain

Larson ordered some goods; do you remembed Captain Larson ordering some goods? A. Yes.

Q. You remember having the conversation with Roberts at that time in which you told him you were looking to the ship for your payments? A. Yes.

Q. Do you remember saying at that time, "Captain, what will I do if the ship is lost"?

A. Captain Larson was present at the time, and she was going away, just about ready to go away, and I told Captain Roberts at that time, I said, "Captain, all I have to look to is the ship for my pay, and in case of the ship going away and anything happens, you would not feel like going down in your pocket, perhaps, to pay my bill, and I would like to know whether the ship is insured," and he held up his hands and he said, "Captain, don't worry about it, old man, I will look to that; she is well insured, and you are well protected."

Q. Captain Roberts knew at that time that you had furnished all of these goods to the vessel, didn't he?

A. Yes—not all of them.

Q. Up to that time, that had been furnished up to the time of that conversation? A. Yes. [53]

Q. Now, after that time, Captain Rudbach, and after all of your bills that are here had been rendered and the materials furnished did you have any conversation with Captain Roberts about payment of those bills?

A. Yes; as I said here, after I had libeled the ship and got back to San Pedro, I met Captain Roberts there and he accused me of being hasty in libeling the ship, that I needn't worry that I would not get my money; he says, "You are afraid you won't get your money"; he says, "The ship is good for it"; that is the remark he made, and that Mr. Sooy was an attorney, and all the attorney wanted was litigation and lawsuits.

Q. Do you remember Captain Larson coming in to order some additional supplies from you, and any conversation you had with him then about the "South Coast" being good for payment?

A. That is the time he came back from Mexico; he came in there and he asked me whether the "South Coast" was still good for a little paint, that he needed to paint the ship—if the "South Coast's" credit was good to paint the vessel.

Q. What did you say?

A. I said, yes, it was all right, I would let him have it.

Q. Was that conversation after the conversation that you had with Captain Roberts about the vessel being good for the bills? A. Yes.

Q. Do you remember when the repairs were being made on the vessel to enable her to pass the United States Inspection at San Pedro? A. Yes.

Q. Do you remember going out to the vessel yourself? A. Yes.

Q. While those repairs were being made?

A. Yes.

Q. Who was there representing the South Coast Steamship Company, do you know?

A. Captain Roberts.

Q. Did Captain Roberts at that time order any goods from you? [54] A. Yes.

Q. Are they part of the bills that have been rendered here?

A. Not in these bills, no; that was part of the bills that have been paid.

Q. That have already been paid? A. Yes.

Q. Captain, do you remember when you first came to San Francisco with these bills before and filed this libel? A. Yes.

Q. Do you remember whether or not upon that occasion you called upon Mr. Sooy and Captain Roberts and asked them to pay these bills?

A. I called on Mr. Sooy, and Captain Roberts, I believe, was out of town at the time.

Q. Refreshing your recollection by that, Captain, you testified upon cross-examination that you had never made a demand upon the South Coast Steamship Company. Are you still of that opinion?

A. I meant at the time that the bills were made out —I thought the attorney had reference to that.

Q. You did, however—

A. I did, however, before I gave you the case, go up to Mr. Sooy's office, in fact two or three times, regarding this matter, and he refused to pay; he told me "These bills that are O.K.'d by Captain Roberts, why, we will pay, but the other we will not have anything to do with."

Q. He said, "We will pay that"?

A. Yes; he meant the South Coast Steamship Company.

Q. Has any part of these bills been paid?

A. No.

Q. And the amount mentioned here is due you for these goods? A. Yes.

Recross-examination.

Mr. CERF.—Q. I understood you just a moment ago to say to Mr. Lillick that Mr. Mills told you that the ship was under charter, and that Levick & Oliver were the charterers, and that Captain Larson spoke about the ship not being liable—that is [55] what I understood you to say.

Mr. LILLICK.—He did not say the ship would not be liable.

Mr. CERF.—I just caught it as he said it. What did Captain Larson tell you in that regard?

A. After the ship was loaded ready for sea, he came in and ordered some stores.

Q. Captain Larson, I am talking about.

A. Yes, Captain Larson, that is who I mean; he came in and ordered the stores, and he says, "Now," he says, "Levick & Oliver will pay for this"; well, I said, "That is immaterial, whatever company pays for it, you understand this, that everything that goes on board that ship is charged up to the ship and owners, and I hold them responsible for it." "Well," he said, "in that case, don't send anything on board until I am satisfied that those things will be paid for," and I held those goods there in the store ready to put on the ship for six or seven days.

(Testimony of J. C. Rudbach.)

Q. You held them until Mr. Mills gave you assurance, that he had gotten—

A. Mr. Mills gave me assurance over the telephone —Captain Larson gave me assurance, he said, "I got a letter from Mr. Mills and he said he later got notice of the money, and he would take care of these bills.

Q. As a matter of fact, didn't Mr. Mills tell you that? Didn't you go to Mr. Mills' house with Captain Larson when Mr. Mills was ill and had his leg strapped up?

A. Yes, but he didn't tell me that at the house; he says he didn't have any assurance or have any funds to pay these bills, and he didn't guarantee anything at that time I was at his house.

Q. Was that the time that Larson told you to hold up the goods until they got word?

A. Yes, there were several days that I saw Mills and Larson, and he was down there trying to get the ship away, trying to get some funds.

Q. Until finally Larson told you that Mills had told him that [56] he had arranged about some notes?

A. Yes.

Q. Did he tell you that those notes were given for Levick? A. I don't know.

Q. Did he tell you that McDonald had given him a note?

A. I don't know who they were given by; the only thing I know is I called Mills up over the 'phone before he had the letter, and they were waiting, I believe, to get these stores on board, and I called him up there and asked him if everything was all right, and he said all right, he had given a letter to Captain Larson; in fact, I believe Captain Larson was with me at the time; more for company's sake, we kept together there; I didn't have any interest in Levick & Oliver; the distinct understanding was that all of the goods I sold was to the ship and owners; it was only to accommodate Larson that I went with him, and he called up Mills over the 'phone, and Mr. Mills told him it was all right, and we went across the bay, and I believe somebody handed him a letter.

The COURT.—Q. Mr. Mills told you he had a letter from the owners that the ship was under charter and no credit should be given to the ship?

A. Not to charge anything to the ship.

Q. You then said that you would not furnish anything on those terms? A. Yes.

Q. You would not send anything aboard the ship unless the owners were responsible? A. Yes.

Q. Mr. Mills said, "If that is the case you had better take it up with Captain Roberts who will be here in a few days"?

A. Yes, he said he would see me in a few days.

Q. Captain Roberts came and ordered some goods?

A. Yes.

Q. Did you tell him that you had had this conversation with Mills and you wanted to know just where you stood in the matter? [57]

A. I don't remember asking him particularly that. I took it for granted that he was the owner there, and ordered the goods there, and it was all right there, that Mills had told him.

(Testimony of J. C. Rudbach.)

Q. You did not ask him then?

A. I did not. I have no recollection that I did ask him.

Q. You furnished the goods?

A. I furnished the goods thinking that Mills had told him. I had other things to take care of.

(A recess was here taken until two P. M.) [58]

AFTERNOON SESSION.

Mr. LILLICK.—The libelant will rest, your Honor.

Testimony of C. H. Sooy, for Claimant.

C. H. SOOY, called for claimant, sworn.

Mr CERF.—Q. Mr. Sooy, are you familiar with the seal of the South Coast Steamship Company?

A. I am, yes.

Q. Are you familiar with the signature of John Roberts? A. I am.

Q. The signature of Howard R. Levick, Jr ?

A. Yes.

Q. I hand you what purports to be a charter-party dated the 19th of June, 1915, made by the South Coast Steamship Company as owner, and Howard R. Levick, Jr., as charterer, and I call your attention particularly to the seal and signatures appearing on the last page, and ask you if that seal is the seal of the South Coast Steamship Company? A. It is.

Q. I ask you if that signature is the signature of John Roberts? A. It is.

Q. And the signature of Howard R. Levick, Jr., is that his signature? A. Yes.

(Testimony of C. H. Sooy.)

Mr. CERF.—We offer in evidence, if your Honor please, this charter, and ask that it be marked Claimant's Exhibit "A," and if I am permitted I will read one paragraph of the charter-party to your Honor, and I will call your Honor's attention to the fact that it is provided by the terms of the charter-party, and particularly the fifth pargraph thereof:

"It is understood that this charter is a charter of the bare vessel, and that said party of the second part shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores and supplies of every kind and **[59]** nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, overtime of crew; agencies, commissions, consular charges, drydocking, painting of the hull of said vessel, furnishing all lines and slings, and pay all other charges whatsoever, of every nature, whether of the same kind as hereinabove enumerated or otherwise that may be incurred in or about the use of said vessel during the term of this charter."

Mr. LILLICK.—Q. Do you offer that portion of it, or all of it?

Mr. CERF.—I offer it all; I read particularly that part to his Honor; there are other provisions of a similar character.

(The charter is marked Claimant's Exhibit "A.")

Q. Now, will you state, Mr. Sooy, whether or not the steamer "South Coast" referred to in this charter-party, was delivered to the charterer therein named? A. Yes.

(Testimony of C. H. Sooy.)

Q. At what time, with respect to the date of the charter-party?

A. On the day the charter-party was signed.

Q. Was the vessel ever returned to the owner?

A. Yes.

Q. When?

A. Sometime, I think, in November of that same year.

Q. 1915?

A. Yes; it might have been in October, I judge, but my recollection is it was November.

Q. Mr. Sooy, did you have occasion to go to San Pedro in the month of August, 1915, at the time the "South Coast" was lying there? A. I did.

Q. Did you on that occasion meet Captain Roberts? A. Yes.

Q. On that occasion, did you meet Mr. Rudbach, the libelant in this proceeding? A. Yes.

Q. Will you please state when and where you met Mr. Rudbach?

A. It was the day before the "South Coast" cleared for Ensenada; she cleared San Pedro harbor about two o'clock in the morning **[60]** of Friday, the 13th.

Q. Of August? A. Of August.

Q. 1915, last year?

A. 1915; I think it was on the 12th, either the 11th or the 12th, I am inclined to think it was the 12th that I met Mr. Rudbach.

Q. Where?

A. At Mr. Rudbach's store in San Pedro.

(Testimony of C. H. Sooy.)

Q. Who was present on that occasion?

A. Captain Roberts.

Q. Who else? A. Myself and Mr. Rudbach.

Q. Will you recount, please, the conversation that you had with Mr. Rudbach on that occasion?

A. In substance, I can; I cannot, of course, give the exact words of it, but I said to Mr. Rudbach, "You have furnished an order of goods here to the steamer 'South Coast.'" He said, "Yes, here they are"; they were laid out in a run-way, a sort of alley-way in his store there, as I recall it, between two streets, and I said, "Do you understand from Captain Roberts that the ship is not responsible for these bills?" He said, "Yes, but Captain Roberts tells me that he is going to pay me out of the money that he gets from Levick." I said, "Captain Roberts is the president of the South Coast Steamship Company, and I am the secretary and attorney of it, and Captain Roberts has just told me," and that was the way Captain Roberts introduced me to Mr. Rudbach, and I said, "I do not want any question at all about this bill or about any other bills that may be incurred on behalf of the 'South Coast,' and I have come here particularly to tell you that."

Q. Was anything further said?

A. Then Roberts said that Levick would be in San Pedro on that afternoon, with the understanding that he was to turn over the money to Roberts, and that Roberts would pay Mr. Rudbach.

Q. That was stated at that time, was it?

A. That was stated at that time.

(Testimony of C. H. Sooy.)

Q. As a matter of fact, do you know whether Captain Roberts at that time occupied some position on the vessel?

A. He was the captain of the ship.

Q. Employed by whom? A. By Levick.

Q. For what purpose, for what voyage?

A. For the purpose of going to Ensenada and return.

Q. Just for the one voyage?

A. Just for the one voyage.

Q. Do you know, Mr. Sooy, whether or not the steamship "South Coast" was under charter from Levick & Oliver to the Western Pacific Steamship Company at that time to make this particular voyage to Ensenada and return?

Mr. LILLICK.—Objected to as irrelevant, immaterial and incompetent; we are not concerned with that; if we have anything to do with this, we have the charter-party.

The COURT.—Yes, is it not material.

Mr. CERF.—I think the objection is well taken, so far as the competency of the question is concerned, because the agreement is in writing.

The COURT.—I think it is well taken as far as materiality is concerned.

Mr. CERF.—This is the only point I wish to make, if your Honor, please: I want to show that Levick & Oliver, the charterers, had made a contract with the Western Pacific Steamship Company for this voyage, and that contract, itself, provided that Captain Roberts should be the master of the vessel for that particular trip, in order to indicate that Captain Roberts' capacity at that time with respect to the "South Coast" was not as an owner, or not as an agent of the owner, but as master of the ship.

The COURT.—This contract would not establish that.

Mr. CERF.—Q. I will ask you this question, Mr. Sooy: **[62]** You say that you were the attorney and secretary of the South Coast Steamship Company? A. Yes.

Q. Were you a director at that time? A. Yes.

Q. Did the South Coast Steamship Company have any interest whatsoever in the voyage of the "South Coast" from San Pedro to Ensenada and return?

Mr. LILLICK.—Objected to on the ground it is incompetent; we are bound, if at all, by the acts of these officers of the company there, and whether they were *interest* in the voyage is no concern of ours; whether they were interested in the voyage they were making is another thing.

The COURT.—It is not except on the theory that the libelant is undertaking to hold them because of some interest they might have had in the voyage. I do not think that is the case at all.

Mr. CERF.—That is the precise reason of the question; I was apprehensive of the position that Mr. Lillick would take that Captain Roberts ordered these goods as an officer of the South Coast Steamship Company; the position we take is he ordered these goods as master of the ship, and in a capacity entirely different from that.

(Testimony of C. H. Sooy.)

The COURT.—I think the Court understands that.

Mr. CERF.—Has your Honor ruled upon the objection?

The COURT.—The objection will be sustained.

Mr. CERF.—Q. Mr. Sooy, at the time the "South Coast" left San Francisco after this charter had been made, did you have any conversation with the master of the ship, namely, Captain Larson, concerning the notification of all persons furnishing supplies and materials to the ship, that the ship was under charter, and that the materialmen and so forth must look to the charterers for their compensation? **[63]**

Mr. LILLICK.—Objected to upon the ground it is hearsay, not binding upon us, not in our presence.

The COURT.—That might be true, but it is of some interest to know whether he took the precaution to advise them. The objection will be overruled.

Mr. CERF.—Will you answer the question?

A. Yes; I did.

Q. Will you state what you said to Captain Larson?

A. When the ship left here in tow on Sunday, bound for San Pedro, where she was to be repaired, I called Captain Larson aside on the dock and told him that regardless of what happened, that I did not want any bills incurred for which the ship would be responsible, and that I wanted him to particularly notify anybody that he was acting for Levick, Oliver & Levick, as we always say—they were really copartners, but Levick was the charterer, it was taken in his name—to notify everyone personally that the ship was not responsible for any bills. That was on Sunday. Then, afterwards, in August, I went to San Pedro, and when we got back from Ensenada I gave Captain Larson written instructions that the ship was not to clear the dock until all of the bills, whatever they were, were paid. I understood from Mr. Mills, that some bills had been incurred, and I, of course, knew that Mr. Rudbach had furnished this bill of $290 odd, something of that kind, and I gave Captain Larson written instructions, as I remember it, wrote the letter out in longhand just before I left the ship, and before I came to San Francisco, and Captain Larson assured me that he would carry out my instructions in that regard, and I believe that he did.

Q. Mr. Sooy, was Mr. Mills ever the agent or the employee of the South Coast Steamship Company?

Mr. LILLICK.—Objected to upon the ground it is not the best evidence; if he was the agent, it would be in writing; the testimony of the witness to that effect would not be binding. [64]

The COURT.—It would be the best evidence if it was in writing; suppose no agency had been created?

Mr. LILLICK.—Is the agency in writing?

Mr. CERF.—There never was any agency.

A. No, he was not.

Q. Do you know whether or not Mr. Mills was acting respecting the "South Coast" at San Pedro?

A. Well, Mr. Mills, in order to make it perfectly clear, originally had to do with the chartering of the

"South Coast" to Levick from the South Coast Steamship Company; he and Captain Roberts were acquainted, friends, and Mr. Mills had become interested in the chartering of the "South Coast" because the Santa Fe Railroad Company wanted to bring ties out of Mexico; and Mr. Mills, the purchasing agent of the Santa Fe Railroad Company, was a friend of his, and he mentioned the matter of the chartering of the "South Coast" to Levick and also to Roberts. Now, when we finally consummated the charter, it was understood, at least I understood that Mr. Mills was to act for Levick and Oliver in and about the repairs of the ship and taking care of her at San Pedro; just what the relationship between Mr. Mills and Mr. Levick or Levick & Oliver was, I don't know, but I knew that he was going to act for them.

Q. Did you, soon after the vessel left San Francisco for San Pedro, write Mr. Mills a letter in connection with the accounts? A. I did, yes.

Q. I hand you a letter and ask you whether or not that is a copy from your files of the letter that you wrote to Mr. Mills on that occasion?

A. Yes, that is the letter.

Q. It was signed, of course, by you? A. Yes.

Mr. LILLICK.—Objected to upon the ground it is not binding upon us, if your Honor please.

The COURT.—Let me see it.

Mr. CERF.—It is offered for the same reason that the instructions [65] were offered.

The COURT.—It is already in evidence that this matter was conveyed to the libelant; the letter, itself, was not read to him, but he saw a letter taken from a pigeon-hole, and the fact of the charter and the conditions as to holding the ship responsible for any goods was made known to him. The objection will therefore be overruled.

(The letter is marked Claimant's Exhibit "B" and is as follows:)

Plaintiff's Exhibit "B"—Letter, June 26, 1915, Sooy to Mills.

"June 26, 1915.

"Mr. E. A. Mills.
Pacific Wharf & Warehouse Co.,
East San Pedro, Cal.,

Dear Sir:—

Under the provisions of charter and option given by the South Coast Steamship Co., the owner of the S. S. 'South Coast,' to Mr. Levick, the repairs now being made to this vessel are to be made for the credit of Mr. Levick and not upon the credit of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify all persons furnishing said supplies, labor or materials, to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested, and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters, because if we wrote it it might in some way injure Mr. Levick, and this [66] I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am, Very truly yours,"

Mr. CERF.—Q. Mr. Sooy, Mr. Rudbach has stated that a few days before this libel was filed, he called at your office in connection with the payment of this account. Will you please recount what transpired at that time between you and Mr. Rudbach?

A. Well, I think Mr. Rudbach called two or three times, just which time it was I do not remember, but the substance of all the conversations was this, Mr. Rudbach made a demand upon me to pay this bill, and I said, "Why, Mr. Rudbach, you have no claim against this ship; you know as well as I do that I myself told you that the ship was not to be responsible." "Well," he said, "I want to get my money, and I have you, because I billed it 'South Coast and owners.' " I said, "It don't make any difference what your bill is, that doesn't control," and then I cited his Honor's ruling in the 'Ray' case, and one or two other cases, and he said he didn't believe that was the rule, that a ship was always responsible, regardless of who operated her, or anything of that kind, that the supplies went aboard the ship, and he wanted the money. I said, "Mr. Rudpach, Mr. Levick or Levick & Oliver have given up this ship, and they have left a whole lot of debts, and possibly a lot of people are—money is owing to a lot of people, that Levick & Oliver ought to pay; the only chance they have to get out at all is to sell the ship, and I have agreed with Levick & Oliver that if they can sell the ship even now, even after I had to put up the money to pay the crew, that I advanced personally, by the way, that if they could sell the ship out and get us the price that we had figured on in the **[67]** first place, which I think was $17,500, they will get enough money out of it so that they can pay these debts, they can sell it, and I do not like to see you go to the expense of bringing litigation which in my opinion will result in your failing to get a judgment." "Well," he said, "I have you on that, because I have billed it 'South Coast and owners,' " and with that he went out of the office; he wanted his money right away, and I told him we would not pay the bill, but that if Levick & Oliver could find a purchaser for the ship, that then I would agree that we would take what we had originally agreed to, and not take any advantage on account of the $10,000 or $11,000 of repairs and tanks that they had put aboard the ship, we would take just what money was coming to us out of it, and they could take the balance"; I think the price they paid for the ship—

Q. That is not material.

A. I do not think so.

Q. On that occasion, or any other occasion, did Mr. Rudbach ever deny that you had told him in his store in San Pedro that the ship was a chartered ship, and that he must look exclusively to the charterers for the payment of this bill?

A. Certainly not. Mr. Rudbach and I had a perfectly clear understanding on that on two occasions.

Cross-examination.

Mr. LILLICK.—Q. You are quite sure about that, are you?

A. There is no question in my mind about it.

Q. Realizing you gentlemen are absolutely opposite in your testimony as to that? A. Yes.

Q. You are an attorney, Mr. Sooy? A. Yes.

Q. Have been for a great many years? A. Yes.

Q. You knew when you were in Los Angeles that Mr. Rudbach had furnished those supplies that were lying upon the floor of his store?

A. They had not been furnished. **[68]**

Q.They were lying there, and you knew they had been ordered by Captain Roberts? A. Yes.

Q. You knew also if this question came up there would be some question about the liability of the vessel? A. No, I do not think so.

Q. Why did you tell him, then—you say that the vessel should not be held responsible?

A. I will tell you why I told him; all the other bills had been ordered by Mr. Mills, so I understood at that time, and when I arrived in San Pedro that morning Captain Roberts said that he had ordered the stores from Rudbach, and I immediately saw, not knowing then that Mr. Rudbach, had been notified by Mr. Mills or anybody else, I immediately saw that since Roberts was the president of the South Coast Steamship Company, and also the captain of the "South Coast" for that voyage, that the ship might be held liable, since the captain, under that statute, was presumed to have authority to bind the ship, and I asked Roberts whether he had made that clear to Rudbach, and he said, "Oh, he understands it." I said, "Does he understand it clearly?" So we went from the "South Coast" across the sand spit and across the ferry and clear up to Rudbach's store for the express purpose of telling Mr. Rudbach just what I have told you, and I explained to him that she was a chartered vessel, and that under the terms of the charter-party would not be responsible for the bills; that was my purpose in going there. I do not want to make an argument upon it.

Q. Feeling the responsibility of the vessel in that respect, Mr. Sooy, why didn't you serve a written notice?

A. I don't know that the serving of a written notice occurred to me at all.

Q. Did you know the rule laid down in the "Milford" case is, where the owners stood by and saw material and supplies furnished to a vessel, that they are responsible, because the inference is that **[69]** they authorize them?

A. If they stand by and make no objection that probably would be true.

Q. You understand that is the rule in that case?

A. I do not recall the facts of that case now; I don't know that I recall the rule.

Q. Why did Captain Roberts O. K. these bills, do you know?

A. Roberts O.K.'d the bills as master of the ship.

Q. And also as president of the South Coast Steamship Company, did he not?

A. I don't know whether he did or not as president, I am sure.

Q. Captain Roberts was the president of the steamship company at that time?

A. He was, and I was the secretary.

Q. Did you not know, as a matter of fact, Mr. Sooy, that Captain Roberts subsequently, not once but many times, said that the vessel was responsible for these goods?

A. Well, of course, Mr. Lillick, what legal determination of the liens against the "South Coast" might have been arrived at by Captain Roberts, I don't know, but I just say that if Captain Roberts decided in his wisdom that there was a lien created, that it would have carried weight in my mind in determining that legal proposition.

Q. That is not an answer to my question: Didn't you know, Mr. Sooy, that as a matter of fact Captain Roberts, not only once, but repeatedly, told Rudbach that the vessel was responsible for the bills?

A. No, I do not. And I would be greatly surprised to learn that he did say any such thing, because I had instructed Captain Roberts before he left for Los Angeles to call upon Mr. Mills immediately upon his arrival there and get a list of the bills, and to notify everyone that that ship was not responsible for those bills.

Q. Mr. Sooy, you had had, as the attorney for the North Pacific **[70]** Coast Steamship Company, a similar experience at one time with a steamer known as the "Eureka," did you not?

A. Four times, I think.

Q. And in your wisdom then, as an attorney, you published a notice, did you not, in a newspaper? Why did you not do it in this case?

A. For the simple reason, when we offered testimony of the publication of that—no, when you offered in the Ray case to introduce the "Guide" and some other newspaper publications, it was ruled out by the Court.

Q. And that was why you did not publish a notice in the newspapers in San Pedro?

A. I might say, however, that without any knowledge upon my part, the newspapers were full of the "South Coast's" sailing and all of that sort of thing, together with more or less complete detailed statements of what she was going to do and where she was going.

Q. And that her owner or owners, Captain Roberts and Mr. Sooy were going with her to Ensenada, did they not?

A. No, they did not mention our names.

Q. Are you sure about that?

A. Not any accounts that I saw.

Q. Mr. Sooy, do you recall having said upon one occasion that even if the South Coast Steamship Company and the steamer should be held responsible for these bills, that the steamer and the company would be ahead anyway by reason of the repairs that were made upon her at San Pedro?

A. Well, I don't remember making the statement, Mr. Lillick.

Q. It is a fact, is it not, that the repairs that were made upon her totaled, with the tanks that were put upon her, something like $10,000?

A. I think about $11,000.

Q. Did you know at that time, and upon the 13th of August, 1915—is that right—Friday, the 13th of August, 1915?

A. Yes, that is the day, in the dark of the moon. [71]

Q. Did you know that the vessel had against her a number of claims for supplies that had been furnished? A. On the 13th of August?

Q. 1915, when she cleared for Ensenada.

A. No, I do not believe that the vessel had any claims against her then, other than the claims which your office represented, and which Mr. Frank's office represented. You mean under the Levick & Oliver regime; is that what you mean?

(Testimony of C. H. Sooy.)

Q. So far as I know, we are only concerned with the question of her supplies during the time between August and October.

A. But you are asking me whether there are any claims against the vessel.

Q. At that time for supplies furnished to her, and during the time that the charterers were putting on these repairs, which amounted to $11,000, you say?

A. I do not think there were any claims against the vessel at all at that time.

Q. Then, the charterers had paid you promptly, had they, for the charter hire due?

A. No. You are talking about one thing, and I am talking about another. I understand your question to be whether or not there were any claims against the vessel.

Q. In August, of 1915, on Friday, the 13th, when she cleared for Ensenada.

A. That is, you mean claims by persons who might have furnished supplies to her?

Q. Yes, Mr. Sooy.

A. No, there were no claims against the vessel at that time.

Q. Not even of Captain Rudbach?

A. I consider that Captain Rudbach did not have any claim against the vessel.

Q. And at that time you made no remark to anyone that you remember that the South Coast Steamship Company has $11, 000 on account of charter hire or repairs that these gentlemen have made [72] upon her, and we are not going to lose anyway?

(Testimony of C. H. Sooy.)

A. I don't remember of making any such remark as that; if you will particularize or get down to telling me who I made it to, probably I did, but I have not any distinct recollection of making any such remark as that now.

Q. On Friday, the 13th of August, 1915, were the charterers of the steamer "South Coast" in arrears in their charter hire?

A. I am inclined to think they were.

Q. How long had she been under charter to them?

A. Since the 26th of June.

Q. And the charter hire specified in the charter is $1250, as I remember it, for the first month?

A. I don't remember what it is.

Q. And $500 a month after the first two months, is it not?

A. The charter speaks for itself; I cannot remember off-hand.

Q. Just prior to August 13, 1915, the vessel had been at San Pedro, had she not?

A. Yes, she went from here down there.

Q. She was towed down by one of the McCormick steamers? A. Yes.

Q. When she arrived there, the charterers placed upon her $11,000 in betterments, did they not?

A. No, they did not; they put on tanks on her deck, which were, of course, no use to the vessel in the lumber trade, that she had been engaged in prior to that time.

Q. But $11,000 had been expended by the charterers upon the vessel, had it not?

(Testimony of C. H. Sooy.)

A. I do not think that is true, in betterments.

Q. Call it betterments, or tanks, or what you please, the charterers of the steamer "South Coast," up to Friday, the 13th of August, 1915, expended $11,000 on that vessel, did they not?

A. No, I don't think they had expended that much.

Q. How much had they expended?

Mr. CERF.—If you Honor please, I have not made any objection to the entire line of testimony, but I cannot see that it will assist your Honor in any way to any determination of this matter; I think it is entirely immaterial.

The COURT.—I will take the testimony; the objection is overruled.

A. I cannot tell you, Mr. Lillick, I don't know. I know there was—when I got back from Ensenada, I went over the matter with Mr. Mills, and it strikes me there was about $3000 owing then.

Mr. LILLICK.—Q. What did you testify a few minutes ago about that $11,000?

A. Well, I testified that the total amount that they had spent in and about the operation of the vessel, and all that sort of thing, was about $11,000; the major portion of that, I think, was in repairs and supplies furnished to the vessel, but I have no accurate knowledge of it, except what I have been told.

Q. Why did you go to Mr. Mills about that?

A. For the reason that I did not want anyone else to have any indebtedness or to furnish any supplies to the vessel until Levick had financed himself.

Q. During the absence of Captain Roberts in San

Diego, to whom did you look to there for the interests of the South Coast Steamship Company?

A. Captain Larson.

Q. To no one else? A. To no one else.

Q. Why should you write to Mr. Mills as you did

A. Because as I understood it Mr. Mills was to have direct charge of the repairs, and checking out the money for Levick in the repairs of the vessel.

Q. And you had no other connection with Mills than that? A. No. [74]

Q. And you looked solely to Captain Larson, did you?

A. I looked solely to Captain Larson. I do not say that Mr. Mills was not very friendly to us, and that he would probably have accommodated us in anything we wanted done, but there was no business relationship between us as I remember.

Testimony of E. A. Mills, for Claimant.

E. A. MILLS, called for claimant, sworn.

Mr. CERF.—Q. What is your full name, Mr. Mills? A. Eugene Allen Mills.

Q. Where do you reside? A. San Pedro.

Q. What is your occupation?

A. I am superintendent of the Pacific Warehouse & Storage Company.

Q. You know Mr. Rudbach, of course?

A. Yes, quite well.

Q. You know Captain Roberts, don't you?

A. Yes.

(Testimony of E. A. Mills.)

Q. Mr. Sooy? A. I do.

Q. The Steamship "South Coast"? A. Yes.

Q. Mr. Mills, do you remember the occasion that the "South Coast" arrived at San Pedro after she had been chartered to Levick, in tow—do you remember when she arrived there in tow? A. I do.

Q. When did you first have any conversation with Rudback thereafter concerning the furnishing of supplies to the "South Coast"?

A. I think it was either the day she arrived, or the day after.

Q. Was that before or after you had seen Captain Roberts? A. It was after.

Q. I will ask you first about the interview you had with Captain Roberts, the first interview you had with Captain Roberts after the "South Coast" arrived at San Pedro in tow; just tell us what it was that Captain Roberts told you?

A. Well, he confirmed the terms of what you call the charter-party, which I [75] consider was more in the nature of a sale, a contract for sale, in which we discussed for some little time previous that we were going to sell this boat to Levick & Oliver, on terms, on a contract, and they were to stand the expense of the repairs; in other words, Captain Roberts told me they had no money to repair her with; in fact, when I brought up the question of a sale, he even mentioned one or two other boats that he thought they had better sell, because they could not put this boat in conditon for service. So, when

(Testimony of E. A. Mills.)

he finally consummated the deal, the charter, sale, or whatever you want to call it of the boat, if I remember right, I was in San Pedro about Wednesday, and either the day following or the day following that Captain Roberts came down as pilot on one of the Luckenbach boats; they dock at our wharf, and he came up to the office immediately and he told me they had closed this deal, which I knew, which I had already heard from Levick, that the deal had been closed, and he said that the boat wanted to be put in repairs immediately, but that the purchasers were going to be responsible for the obligations of the vessel from that time on; the day before, or else that very same day, I am inclined to think it was that same day, in talking with Captain Rudbach on the 'phone, he happened to be the first one that I had talked to in regard to supplies, I told the captain that we wanted a few supplies for the ship, but that I did not know *why* was going to pay the bills, but that I would be personally responsible for that one order, that one particular order I would be responsible for personally.

Q. How much did that order amount to, if you remember?

A. I do not suppose it amounted to over $5 or $10, enough to keep five or six caulkers busy; that is what they were doing, caulking the ship; I don't believe it would be over $10; it [76] might have been; at any rate, not much over that. At any rate, the following day Mr. Levick arrived on the scene, and he made his arrangements with me, and with Captain

Larson for the payment of the bills; as I understand it, the arrangement was that Captain Larson was to be given cash to take care of the crew; they had a little crew; any indebtedness that I wanted to pay for was to be covered by a draft by me on his bank in San Francisco, which is customary in our dealings with any ship owner; so, along those lines, I immediately told Captain Larson he could go ahead and the chances are, I told Captain Rudbach he could go ahead and furnish these supplies, that I was satisfied that proper arrangements had been made. Captain Roberts told me as soon as he got there that we would have to look to Levick & Oliver for the money, and that is the reason I would only guarantee this first bill, and I waited until I saw Mr. Levick before I authorized any further orders.

Q. In other words, you would not authorize any further expenditure until Levick had financed the bills?

A. I did not dare. We act in these matters, it is more of an accommodation service, it is a service for which we do not receive any reward; it is the same way as Captain Rudbach does, I guess, in furnishing supplies to a ship, if a man wants some little fresh vegetables or meat, something that he does not carry, he will go and get it for them, and we do those same things for our customers, but I did not dare obligate either myself or the company on a proposition that I was entirely in the dark on. [77]

Q. And you remained in the dark until Levick arrived, did you?

A. As I say I do not recall whether he arrived that day or the following day. I think I could find that out by reference to the data that I have.

Q. Then what transpired between you and Levick?

A. We talked the matter over and made this arrangement and went to lunch, and at lunch time we met Captain Rudbach; I introduced him to Captain Rudbach and I am almost positive I introduced him as the new owner of the "South Coast"; the fact that he was really a charterer did not appeal to me because I thought that I had been instrumental in making a sale, not a charter, and I introduced him as the new owner.

Q. Now, there were supplies that were furnished and work that was done on the ship, the "South Coast"? A. Yes.

Q. What capacity did you occupy in those operations, what position?

A. More in the nature of a disbursing agent; I don't know as you would call it a disbursing agent, because I really had no connection whatever with either the former owners or the new owners, except that in our dealings down there we handle a great many financial transactions of any note whatever; in other words, a vessel may be loading cargo at our wharf and we will advance the railroad freight charges for the charterers or for the vessel's owner, with the expectation that when the vessel clears she will settle up all of her indebtedness with us; these matters may run along indefinitely. In this instance I was not sure of the financial responsibility of Mr.

Levick and made him make an arrangement with me whereby I could draw on him at San Francisco; after that arrangement was made then I did not hesitate to go ahead and authorize the repairs to go *head.*

Q. After these arrangements were made what relationship existed between you and Levick? [78]

Mr. LILLICK.—We have no objection to the witness stating the facts, but his conclusion as to this relationship we object to. Just tell what you did and what Levick did?

A. I paid bills for Levick & Oliver and drew drafts against their San Francisco account to cover it.

Mr. CERF.—Q. How about ordering goods, ordering supplies and materials and that sort of thing?

A. I don't know but one or two items that I ordered after that first order I gave Captain Rudbach; in fact in San Pedro, the only thing that I remember we ordered something up in Los Angeles, a valve, or something from Crane & Company over the telephone, and I ordered that for the boat; outside of that there might have been one or two other items that I did, but I don't recall if there were; I am pretty positive about that.

Q. Now, do you remember having received a letter from Mr. Sooy concerning the payment of bills?

A. Yes, that was several days after the boat had arrived.

Q. Several days after?

A. That was after Captain Roberts had told me the same thing.

Q. Captain Roberts told you the same thing?

(Testimony of E. A. Mills.)

A. I also received the same information from Mr. Levick that Levick & Oliver were to be responsible for the bills.

Q. After you received this letter from Mr. Sooy, did you call again Captain Rudbach's attention to the fact that he must look for his compensation to Levick & Oliver?

A. Yes. Not with particular reference to that letter, but you must understand that these dealings ran over a period of 3 or 4 months, and during that 3 or 4 months I probably had 15 or 20 conversations with Captain Rudbach, in every instance of which I made it plain to him I had to get my money from Levick & Oliver before I could spend any money. I do not mean to say that upon receipt [79] of that letter that I immediately went and told him the circumstance, because I had already told him that until Levick had satisfied me in regard to the money end of it I could not order any more goods, but I did on numerous occasions tell him that I was getting this money from Levick & Oliver.

Q. What did you do after the vessel was delivered at San Pedro; did you do anything in regard to her for the South Coast Steamship Company; that is to say, the people who are referred to as Sooy & Roberts?

A. I never knew there was such a concern as the South Coast Steamship Company until sometime after she arrived there; my understanding was that Captain Roberts and Mr. Sooy owned the vessel jointly; the South Coast Steamship Company as a

(Testimony of E. A. Mills.)

corporation so far as I was concerned did not exist until sometime afterwards; it was Captain Roberts and Mr. Sooy as partners.

Q. After Levick appeared upon the scene of action did you act at all for Captain Roberts and Mr. Sooy in connection with the "South Coast"?

A. No, I did not. You mean in any capacity whatever?

Q. In connection with the "South Coast"?

A. No, I did not.

Q. Now, when the ship returned from Ensenada did Mr. Sooy have any conversation with you concerning his desire that the ship should be tied up at the dock until everybody was paid?

A. Well, I do not recall the exact conversation. I do remember that when the ship returned from Ensenada or possibly before—no, it must have been after—it must have been after the boat returned from Ensenada, either the day after or—I would not want to say whether it was just before or just after, but it was while Mr. Sooy was there in connection with the Ensenada trip, he came in the office and asked me how many bills there were outstanding against the ship that Levick & Oliver had contracted [80] for, and at that time I told him there were in the neighborhood of about $3,000 worth of purchases; I am not sure but what there was a little over $3,000; it might have been a little under.

Q. Who asked you that? A. Mr. Sooy.

Q. Now, you had several conversations I believe you have testified to here with Captain Rudbach concerning payment of his bills? A. Oh, yes.

Q. On any one of these occasions was the name of a person who was to pay him mentioned?

A. In every instance.

Q. Who was that person? A. Mr. Levick.

Q. Was the name of Roberts or Sooy ever mentioned between you and Captain Rudbach in connection with the payment of these bills?

A. Well, not by me of course in the sense that they were to pay the bills—the names of both Captain Roberts and Mr. Sooy were mentioned quite frequently in connection with the affairs of the vessel.

Q. But I am talking about the payment of the accounts?

A. Not in regard to the payment of the bills.

Q. The person who was always talked of as being the one who was to furnish the money to pay the bills was Levick?

A. Absolutely, so far as I was concerned, he was the only one.

Q. I am talking about the conversation you had with Mr. Rudbach?

A. That is what I am talking about.

Cross-examination.

Mr. LILLICK.—Q. You did not tell Mr. Rudbach that Levick had chartered the boat, did you?

A. I thought he bought it; I should have known better though.

Q. Isn't it true, Mr. Mills, that Mr. Rudbach repeatedly told you that he didn't care whether Levick paid for them or who paid for them, he was looking to the ship and her owners for payment? [81]

A. That was some little time, naturally, it would be some little time after the first indebtedness had been incurred, but his contention from that standpoint did not appeal to me at the time because so far as I thought Levick & Oliver were the owners; in other words, to bill them against the "South Coast" and owners would mean the "South Coast" and Levick & Oliver, not the "South Coast" and Roberts & Sooy.

Q. Is there any question in your mind but that Captain Rudbach in good faith sold these goods to the vessel and her owners? A. No, there is not.

Q. He sold them to whoever ordered them, with the honest intention of holding the vessel and her owners for it, did he not?

A. I think that was his intention.

Q. And he told you that too during the time it repeatedly came up, and he said, "Well, I am looking to the vessel and her owners for the payment of these goods"? A. Yes, he did.

Q. And he thought at that time that Levick was the owner—he had no reason to disbelieve that?

A. He had no reason to disbelieve Levick was the owner, because I had told him he was.

Q. He thought as a matter of fact that he was selling to the vessel and her owners?

A. Absolutely.

Redirect Examination.

Mr. CERF.—Q. Of course irrespective of what

(Testimony of E. A. Mills.)

Mr. Rudbach thought, Captain Roberts told you that the vessel was not to be responsible for it, but that Levick was, and when you got Mr. Sooy's letter in which he stated the vessel was not to be responsible, but that Levick the charterer was, you told that to Mr. Rudbach, did you not?

A. Oh, yes; I told him direct he would have to get this money from Levick repeatedly.

Q. And that was before any of these goods were ordered from [82] Captain Rudbach?

A. No, it was after.

Q. I mean it was before any of the goods involved in this case were ordered.

A. The first order as I say of five or $10. I guaranteed personally. After Mr. Levick had shown me that I could recollect immediately without any delay by drawing a draft on him in San Francisco I then told Captain Rudbach that Mr. Levick had made satisfactory arrangements with me and he could go ahead and furnish supplies for the ship; the supplies following that furnished by the San Pedro firm I did not order because we had Captain Larson and we had a chief engineer on the ship, and we also had a ship carpenter who was put there to supervise the gang of carpenters, and we gave these boys permission to go ahead and order their stuff; after the first order, I don't think unless it was because they wanted me to do the telephoning or something of that kind, I don't think I ordered a thing; in fact, I am not in San Pedro more than about half of the time.

Q. This question I asked you, whether or not you did not tell Captain Rudbach about Roberts' conversation with you and Sooy's letter to you, whether you did not tell him those things before he delivered any of these goods which were bought, beginning in August?

A. Well, I would not say, but the account certainly must have been very small because I got Mr. Sooy's letter just a very few days after Captain Roberts had told me the situation, and it is my recollection that I had that letter in front of me one day when Captain Rudbach came in my office, and I read over that letter and told him what the situation was, explained it to him.

Mr. LILLICK.—And he said, "Well, I am looking to the vessel and her owners in that case, too"?

A. I don't think he did at that time; I don't think really he did then; I think it came up later when we all began to work about the money; at that time I don't think there was any question about it, but later when we all [83] began to work about the money, then it began to be a question of libel suits and one thing and another, and with me it was not a question of libel suits; I could not very well resort to that; I had a letter from both former owners and new owners telling me who was responsible, and in view of such written evidence of that kind I was, you might say, up a tree, but I really think it was quite a little bit later after we began to worry about the bills, about the actual libelling of the ship and placing liens against the ship occurred, because there was really no occasion in the early days; the thing ran along for quite a little while; all I had to do was to draw a draft, every time I paid the bills; later the drafts were stopped and they made other arrangements with a bank in Los Angeles, and then about the time the vessel was really ready for sea they really got into their money difficulty, so it was more likely at that time that any question of libelling the ship would have come up.

Q. In the meantime that would also apply to Captain Roberts and Mr. Sooy down there—they were down there as the owners of the vessel, were they not in August, 1915?

A. No, I would not say that they were.

Q. Do you remember when they started for Ensenada?

A. I remember about the time; I was in Los Angeles the day they started.

Q. But they were there and so far as you knew they had an interest in the vessel; you thought they were owners of the vessel, didn't you?

A. No, I knew they were former owners of the vessel; I knew Captain Roberts was going to be captain on the trip.

Q. You also knew that Captain Roberts was the man who ordered these goods from Captain Rudbach, did you?

A. Yes, as captain of the ship; in fact he told me he would **[84]** pay for the bunch of supplies, that particular lot of supplies; he said that Levick had given him $1,100, I believe, to pay for the expenses of that trip, and he was to pay for those supplies; he didn't do it; and the next day or a few days afterwards I met Captain Rudbach and the Captain asked me if I had that money, if Roberts had left it with me, and I told him no, and I presume I used the expression that he used this morning, not that I meant anything disrespectful.

The COURT.—Q. But because it was true?

A. I won't deny it, even if the gentleman is present; I do not think that we will lose our friendship through that.

Testimony of John Roberts, for Claimant.

JOHN ROBERTS, called for the claimant, sworn.

Mr. CERF.—Q. Captain Roberts, were you at Ensenada during the months of June and July, 1915?

A. Yes.

Q. What were you doing there?

A. I was a pilot for the Luckenbach Steamship Company.

Q. You were a pilot for the Luckenbach Steamship Company? On any of the occasions of your visits to San Pedro during the months of June and July, 1915, did you ever order any goods from anybody for the South Coast Steamship Company?

A. June and July?

A. June and July, 1915? A. Yes.

Q. In the month of August, 1915, did you go to San Pedro in connection with the South Coast Steamship Company?

A. Yes; I arrived there the day before she got in with a tow.

(Testimony of John Roberts.)

Q. Just listen to the questions that I ask you, Captain, and we will get along much faster. In the month of August, 1915, did you go to San Pedro in connection with the steamship "South Coast"?

A. No.

Q. Were you at San Pedro in connection with the business? **[85]** A. Yes.

Q. In what capacity?

A. Pilot for the Luckenbach Steamship Company.

Q. In what capacity in connection with the "South Coast" in August, 1915?

A. President of the company, but I had nothing to do with it.

Q. Now, Captain, just listen to the question; I am not asking you about June or July; I am talking about August. In August, 1915, the steamship "South Coast" left for Ensenada, didn't it?

A. Yes, on August 13; that is right.

Q. Did you have anything to do with that voyage?

A. Yes.

Q. What did you have to do with it?

A. Mr. Levick ordered me as master to take charge of her for one voyage.

Q. A voyage from San Pedro to Ensenada and return? A. Yes.

Q. Did you act as master for the voyage?

A. Yes.

Q. Did you on that occasion order some goods from Captain Rudbach?

A. Yes, I ordered some stores, some groceries only.

(Testimony of John Roberts.)

Q. Are those the goods which are referred to in a bill or an account which has been presented here and which bears your signature, John Roberts—I am now handing you "Libelant's Exhibit 1."

A. I want to see the whole bill; yes, that is right. That is the one I O. K.'d.

Q. Did you ever order from Captain Rudbach any goods of any kind or description except those which are referred to in these bills which you have approved, namely, "Libelant's Exhibit 1"?

A. No.

Q. You never did? A. I never did.

Q. When you ordered these goods from Captain Rudbach will you tell us, please, what conversation took place?

A. Well, I first took a store bill, a bill that was made out by the steward aboard the ship, and gave it to Mr. Rudbach and told **[86]** him to fill it out and told him it was for Levick & Oliver for the "South Coast," and that I was going as master to Ensenada and back, and that if I had money enough I would pay him; that I had so much money from Levick & Oliver, and that I would pay him; I would try to pay him, it followed I did not have enough to pay him; I had to take enough money to Ensenada, which is a foreign port, and he got mad with me that night, and I don't know exactly what conversation there was between us, some little conversation, and I did not pay him, and when I came back from Ensenada he wanted to know why I didn't pay him, and

(Testimony of John Roberts.)

I said I didn't have enough money and that Levick & Oliver were going to pay him.

Q. Do you remember going over to Rudbach's store with Mr. Sooy? A. Yes.

Q. That was a day or so before the vessel sailed from San Pedro?

A. That was on the 12th, in the afternoon; on the 12th, I think it was, the 12th or 13th; I am not sure; it might have been the day that we sailed; we sailed early in the morning, one o'clock in the morning; we were not ready until midnight.

Q. You remember the occasion when you went over to the store? A. Yes.

Q. Do you remember the conversation which took place at that time?

A. Yes. I said "This is my partner."

Q. I asked you if you remembered it? A. Yes.

Q. Now, just tell us what it was.

A. I said, "This is my partner and I want you to talk to him about this ship," that the stores was on Levick & Oliver. Then Mr. Sooy started in to talk to him; I heard the conversation,—that the ship would not be responsible in any way, that she was a chartered ship, and also to be sold to Levick & Oliver; Mr. Sooy explained to him, to Captain Rudbach, the whole thing.

Q. Was there any other thing done at that time that you and Mr. [87] Sooy went over to Rudbach's store for? Did you go for any other purpose? Did you order any other goods?

A. I may have ordered a few little things, some few little trifling things that were forgotten; I don't know how much, maybe a few dollars.

Q. You don't remember whether you did, or not?

A. No, I suppose I did.

Q. I asked you if you remember.

A. I think I do; I think I did.

Q. I don't want your supposition.

A. It did not amount to very much, however.

Q. Did you on any occasion after the libel was filed in this suit tell Captain Rudbach that the ship the "South Coast," was liable for all of those bills and that he would be paid and that Mr. Sooy as a lawyer was interested in promoting litigation concerning this ship?

A. I was not here when the ship was libeled.

Q. I am asking you whether or not you ever had any such conversation.

A. With Mr. Rudbach?

Q. Yes. A. No, indeed I did not.

Q. Did you ever on any occasion tell Rudbach that the ship the "South Coast" was responsible for these bills? A. I never did.

Q. As pilot of the Luckenbach Company, you have occasion to go to San Pedro about twice a month, have you not?

A. Yes, sometimes four times, according to the ships that arrive.

Q. Between August and the end of the year you went to San Pedro very frequently, didn't you?

A. Yes; I have a memorandum book, I always keep a diary, but I have not it here.

(Testimony of John Roberts.)

Q. I am asking you if you went there very frequently. A. Yes.

Q. On any one of those occasions did Mr. Rudbach ever present you with a bill for any of the goods which he had sold that went aboard the "South Coast"? A. No. **[88]**

Q. Did he on any one of these occasions ever ask you when the bill was going to be paid?

A. No, only this bill.

Q. Did he ever ask you to pay any of these bills?

A. Only this bill.

Q. Did he on any occasion ask you to pay that bill except the time you came back from Ensenada?

A. No bills whatever.

Q. After you came back from Ensenada and came up to San Francisco and started to act again as pilot for the Luckenbach Company did Captain Rudbach ever ask you to pay any bill, even this one that you O. K.'d?

A. He spoke to me, said he was not getting his money, and I said, "You had better get after Lillick."

Q. Did he ever ask you to pay it? A. No.

Q. Did he ever present you with any one of these bills approved by Larson or Johnson or any of the other masters? A. No, I never saw them.

Q. But when you were down at San Pedro twice or three times a month did you always see Captain Rudbach? A. Always.

Cross-examination.

Mr. LILLICK.—Q. Are you quite sure about that,

(Testimony of John Roberts.)

that Mr. Rudbach never asked for payment of any of these bills? A. Excepting this one.

Q. He asked you to pay that one? A. Yes.

Q. Never asked you about any of the others?

A. No.

Q. Never had any conversation with you about it at all?

A. No—yes, he asked me who was going to pay them, and I said, "You had better look to Sooy and Mr. Mills."

Q. So he did have several conversations with you?

A. Two or three times he wanted to know who was going to pay them.

Q. You said that Mr. Sooy and Mr. Mills?

A. I didn't know anything about the other bills, I didn't know [89] how much—how much the vessel had charged up to her, I could not say.

Q. You remember coming to my office about this, don't you, Captain Roberts? A. Yes.

Q. About this case? A. Yes.

Q. You were the president of the South Coast Steamship Company during all this time, were you not? A. Yes.

Q. Captain, those supplies that are named in these bills were all supplies that were used on the "South Coast," weren't they, on the steamer "South Coast"?

A. I don't know, except only this one bill.

Q. You know about that, don't you?

A. About this one bill.

(Testimony of John Roberts.)

Q. They were the ordinary supplies taken by the vessel on her voyage; they were for the crew and captain, and they were part of the supplies that were on the ship when Mr. Sooy was down there and you asked Mr. Rudbach to have a little bite of supper with you?

A. No, you are mistaken about that.

Q. Tell me about that.

A. I didn't see any other bills but this bill. He said that he had other bills against her, but I didn't know anything about them. I know there had been some from time to time, but I didn't know how much, what the amount was; I didn't know who was going to pay them.

Q. You remember the time that he came down there when Mr. Sooy was eating in the cabin, and you asked him to come down and have some supper? A. Yes; I did not go down.

Q. But he went on down?

A. He went on down.

Q. He asked you, then, for the money for this bill, didn't he? A. Yes.

Q. And you said, "Well, that is all right, you see Mills, he will pay you; I left the money up there with Mills"? A. No, I don't think I did. **[90]**

Q. What did you tell him?

A. I told him that I would try and pay him the amount of this bill, which I always did want to pay Mr. Rudbach.

Q. He is entitled to the money, isn't he?

A. This bill he is not.

(Testimony of John Roberts.)

Q. Don't you think he is entitled to it?

A. No, he is not entitled to it, not by me, because I have no money. Mr. Levick took this money for this voyage and spent the money; I don't know how he spent it but he gave me $1,000 for to take along and pay these bills and pay the crew, which I spent the money to pay the crew off and pay for other bills and did not pay this bill.

Q. You went on down to Ensenada? A. Yes.

Q. Mr. Sooy went with you? A. Yes.

Q. And you came back here? A. Yes.

Q. San Pedro is just as much a foreign port to the "South Coast" as Mazatlan, is it not? A. No.

Q. Why not?

A. Because she has been running there for the last 20 years.

Q. She is registered here, is she not? A. Yes.

Q. You know that a vessel whenever she is in any port except the home port is in a foreign port?

A. I can get credit in San Pedro, but I could not get credit in Ensenada.

Q. You say you could get credit in San Pedro?

A. Yes. I don't know as I could get credit on the "South Coast."

Q. I do not mean your personal credit, but for supplies to a vessel.

A. As a general thing they do give credit, they know the owners.

Q. Now, Captain, is there any question in your mind that Rudbach thought he was delivering these goods to the steamer "South Coast" and they were being sold to the owner of that vessel? [91]

A. No; to Mr. Levick & Oliver all the time. I would like to state to the Court.

Mr. CERF.—Never mind.

Mr. LILLICK.—We will be very glad to hear it.

A. I would like to state to the Court this, that when the ship was under charter to Levick & Oliver, I told Captain Larson and the engineer that the ship was chartered to Levick & Oliver and that no bills should go against the steamer whatever, in any way, shape or form, and if they should at any time, to notify me or Mr. Sooy.

Q. You knew during all of this time that a man like Rudbach and the Hipple Machine Works and the other people down there were looking to the vessel for their payment? A. No.

Q. Don't you know that they were looking to the vessel for payment?

A. No; I hold up my hand to God, they never did; they looked to Levick & Oliver; they all the time looked to those men, as Mr. Mills also knew; because a vessel is lying there for a year, and the vessel had no money—I owned the "South Coast" and Mr. Sooy was trusting simply to me, and the vessel had been abandoned on two or three different occasions, and she was left in a big debt, and that is the reason I took hold of this vessel, this little steamer, and everybody in San Pedro knew that this vessel was chartered to go to Mexico, and she was chartered by Levick & Oliver with the privilege of buying her; they never paid us the $3,000 for the advance money that they were to pay; they never paid me one cent.

Q. Captain, how much did they put on her,—tanks? A. They put tanks for their own use.

Q. In money is what I mean.

A. In the neighborhood of about $8,000.

Q. Was it not ten or $11,000?

A. No; the crew and everything, after they threw her up, when they had no money, it would amount **[92]** to about $11,000, I should judge.

Q. Did you hear Mr. Sooy testify a little earlier?

A. He was right.

Q. That is, that $11,000—

A. About $11,000, in the neighborhood of $11,000. I could not tell exactly.

Q. And $8,000 of that went into the vessel—I mean went into the vessel as permanent improvements on the vessel?

A. Yes, but you must understand that the crew was paid, and there were libels and one thing and another on the things that had to be paid.

Q. You were down there when these goods were being furnished to her, were you not?

A. I was down there from time to time; Captain Larson had full charge of the work with this man, this carpenter, and also Mr. Mills.

Q. And you knew that these men down there were supplying these things to the vessel, didn't you?

A. Yes, I knew, because I knew they were to settle it with Levick & Oliver, not with me; they knew I had nothing.

(Testimony of John Roberts.)

Q. You ordered part of them yourself, didn't you?

A. I ordered them for that voyage; I got a leave of absence for three weeks to go on this trip to Ensenada from the Luckenbach Steamship Company, I was working for them.

Q. You took the "South Coast" back, didn't you, from Levick & Oliver?

A. No, I did not, they just simply threw it at me.

Q. It came back to you with this $8,000 worth of improvements and tanks and the other things, and you have got those now, haven't you, there on board the "South Coast"?

A. I am telling you that we did not get $8,000, because there was $8,000 spent paying for crews and everything of that kind.

Q. The $8,000 was spent for the crew and for the supplies and other things?

A. For supplies and one thing and another, and [93] then they spent—I don't know how much they spent.

Q. Didn't you testify just a moment ago that $3,000 of that money went to the crew, and for supplies—what is the fact about it, Captain? How much did the tanks and the other repairs that you say were done to enable her to pass inspection cost?

A. The tanks in the neighborhood of $2,800.

Q. What did all the other things that enabled her to pass inspection cost,—about $8,000?

A. Well, I am telling you that the crew, paying them off, after she made her voyage to Mexico—

Q. —That cost $2,000 more, didn't it?

(Testimony of John Roberts.)

A. It was $11,000.

Q. And $8,000 of it Captain, went into—

A. —Repairs.

Q. Into repairs and tanks?

A. I could not say that it did; I could not say; it would probably cost $8,000.

Q. That is your best impression, your best judgment? A. Yes.

Q. Do you remember Rudbach being with you at the time you went over the vessel when she was being made ready to pass the United States inspection?

A. Yes, he helped me.

Q. He helped you and he furnished those goods there under your orders, didn't he? A. Yes.

Q. Now Captain, after going over this again, don't you remember telling Rudbach that the vessel was responsible for those bills that he had owed him?

A. Mr. Lillick, how could I tell Mr. Rudbach? How could I tell him such a thing as that, when it was not so.

Q. You say that is not so?

A. It is not so, no.

Q. Do you testify Captain—this is very serious, Captain—do you testify here under oath, that you never told Captain Rudbach?

A. I never told him.

Q. Let me finish my question. That you never told Captain Rudbach **[94]** that the steamer was responsible for those bills and he would get his money?

A. Mr. Lillick, how could I tell him that when the vessel was under repairs to Levick & Oliver—I could not tell him that.

Q. She was under repairs to Levick & Oliver, but didn't you tell Rudbach that? A. No.

Q. Didn't tell him that at San Francisco after these bills were furnished, after these goods were furnished?

A. No, I did not; I could not have told him such a thing as that.

Q. You did not tell him that after you had been to my office to talk about this with me?

A. I never told him such a thing as that.

Q. You absolutely deny it? A. Yes.

Mr. CERF.—We rest.

Testimony of J. C. Rudbach, for Libelant (Recalled in Rebuttal).

Mr. RUDBACH, recalled in rebuttal.

Mr. LILLICK.—Q. Captain Rudbach, you have just heard Captain Roberts testify before he left the stand, that he never told you that the steamer "South Coast" would be responsible for these bills of yours. What do you say to that?

A. He not only told me on one occasion but he told me at the very least on half a dozen occasions.

Q. Have you in mind any occasion when someone else was present at such conversations?

A. Yes, at one conversation Captain Larson was present when we talked about insurance. Do you want me to explain that?

Q. By all means.

A. After they came back from Ensenada and before she was going away again, and after they had refused to [95] pay me, claiming they had no money, and so forth, that Levick & Oliver should pay these bills, and that would be all right, I said, "Captain, I will hold the ship responsible for those goods, you know they are charged to the ship," and I said, "This Levick & Oliver stuff I have nothing to do with it, because I do not look to them for anything, if they pay me well and good, I am satisfied, but I look to the ship and owners"; I said, "All I have is the ship now if anything should happen, and if the ship got lost you perhaps would not feel like going down into your pockets and pay these bills," as I understood he was the owner and I wanted to know if the ship was insured, and he said, "the ship is insured and the ship is responsible for your bills and don't worry about it."

Q. Are you positive about that, that "the ship is responsible for your bills and dont 'worry about it"?

A. Yes.

Q. You are positive about it?

A. Yes, positive.

Q. Now, about that conversation that you had with Mr. Mills with reference to the responsibility of the owners of the vessel, will you go over that again and give me your version of it?

Mr. CERF.—Just a minute, if it is the idea of counsel to ask for a repetition of testimony which has already been given by this particular witness I object to it on that ground.

The COURT.—The objection will be sustained

We had his conversation.

Mr. LILLICK.—We had the conversation but the captain during the lunch hour gave me a statement about something that he wanted to state.

The COURT.—Let it go in.

Mr. LILLICK.—Captain Rudbach I understand Mr. Mills told you that he had received a notice from Mr. Sooy? A. Yes.

Q. Was that notice that Mr. Mills testified about, and a carbon **[96]** copy of which was put in evidence; will you tell us what occurred after that with reference to your having inquired about the ownership of the vessel, if you did so inquire?

A. Yes, I inquired from Captain Larson afterwards.

Q. What did you say about it?

A. Well, I told Captain Roberts about it; I said, "You are the owner of this ship," and he said yes.

Q. Now, at that conversation with Captain Roberts when you talked to him about it, was anything said about who would be responsible for the bills ordered, whether the South Coast Steamship Company or the vessel was going to be responsible for it?

A. The vessel at that time; I told him I had been furnishing goods to this vessel now and I said, "they are all charged to the ship and the owners" and he says, "Well, old man, I know all about it," he said, "don't worry about it, the ship will be responsible for it."

Mr. CERF.—No questions.

Testimony of Peter L. Larson, for Libelant (in Rebuttal).

PETER L. LARSON, called for the libelant in rebuttal, sworn.

Mr. LILLICK.—Q. Captain Larson, you were one of the captains of the steamer "South Coast" during the time when Mr. Rudbach furnished supplies for her, were you not? A. Yes.

Q. Do you remember any conversation that occurred where Captain Roberts was asked by Mr. Rudbach, "Is your vessel insured"? A. Yes.

Q. In that conversation did Mr. Rudbach say to Captain Roberts "I am going to hold the vessel responsible for my bills?"

A. I did not hear that, but he said "you are protected."

Q. Instead of my asking you questions in that way Captain, tell us your recollection of what if anything Captain Roberts said to Captain Rudbach about the vessel being responsible for those [97] bills and he would get his money?

A. The conversation took place in San Pedro, in which Captain Rudbach said to Captain Roberts, I was standing alongside of them—"You know Captain, I could not afford to lose these bills, the ship may be leaving this port; you are here now," he says, "and I want to know from you what is going to be done." Captain Roberts says, "That is all right, old man, you will be taken care of, you are all right." Then Captain Rudbach says, "How, in what way—is the ship insured?" and Captain Roberts says, "Yes, and you will be protected."

Q. Do you remember whether anything was said at that conversation by Roberts that the vessel would be responsible for the bills? A. I did not hear that.

Q. Captain, you came up to San Francisco after this vessel was libeled did you not, or was it before?

A. After she was libeled.

Q. And you brought to my office certain bills of other people, did you not? A. Yes.

Q. Did you have any conversation with Captain Roberts about the responsibility of the steamer "South Coast" for those bills, that is, the bills which you brought up?

A. With Captain Roberts?

Q. Yes. A. I saw him, but he disputed them.

Q. You saw him but he disputed them? A. Yes.

Q. During the time you were captain of the vessel you ordered certain supplies yourself, did you not?

A. I bought some under orders from Mr. Mills; when I was engaged in San Francisco and took the boat down Mr. Sooy gave me instructions in his office in this way, "Do all you can now," and he said, "Captain Roberts will met you in San Pedro at your arrival and give you full instructions"; the day we came into San Pedro Captain Roberts came out in a tug and met us, and [98] placed us in a berth for repairs; I said "Captain Roberts, what are the instructions, who is going to buy the stock, who is going to engage the carpenter and who is going to attend to all these things?"

(Testimony of Peter L. Larson.)

He said, "Mr. Mills." I went to Mr. Mills on the following day and he ordered such things as were necessary for the repairs.

Q. Were these repairs made upon the vessel, Captain? A. Yes.

Q. Did you order certain things from Captain Rudbach here?

A. Yes, but not before several orders were given by Mr. Mills.

Q. Now, on those things that you ordered, were they delivered on the vessel? A. Yes.

Q. Were they used on the vessel? A. Yes.

Q. Could the vessel have gone to Mexico without them? A. No.

Mr. CERF.—No questions.

Mr. LILLICK.—We rest.

(Thereupon the case was submitted upon briefs 10, 10 and 5.)

[Endorsed]: Filed Jul. 22, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[99]** |

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,

Respondent.

SOUTH COAST STEAMSHIP COMPANY,

Claimant,

Opinion and Order to Enter Decree in Favor of the Libelant for the Amount Prayed for.

IRA S. LILLICK, Esq., Proctor for Libelant.

MERCEL E. CERF, Esq., H. W. GLENSOR, Esq., and CHARLES H. SOOY, Esq., Proctors for Respondent and Claimant.

Libelant furnished supplies at various times to the Steamer "South Coast" in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ships account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners; and if they did not want **[100]** it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy one of the owners not to deliver any goods on the credit of the ship. So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.

The charter in question contains the following provisions:

"Fifth:—It is understood that this charter is a charter of the bare vessel, and that the party of the second part (Levick) shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, over time of crew; agencies, commissions, consular charges, dry docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter."

"Tenth:—Said party of the second part further covenants * * * that if said payments (charter hire) be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second
[101] part, will hold and save harmless the said

party of the second part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith."

While these provisions require the charterer to pay all expenses incurred in operating the vessel they do not deprive him of authority to bind the vessel therefor. Indeed they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel arising or created during the term of the charter-party. The Act of June 23d, 1910, gives a maritime lien to any person furnishing supplies to a vessel, whether foreign or domestic, upon the order of the owners, which lien may be enforced without alleging or proving that credit was given to the vessel. It also provides that the managing owner, ship's husband, or master, appointed by a charterer, or an agreed purchaser in possession of the vessel, shall be presumed to have authority from the owner to procure such supplies.

The only condition upon which such lien may not be created is found in the following words of the

Act "but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, agreement for sale of the vessel or for any other reason, the person ordering [102] the supplies was without authority to bind the vessel therefor." But by the charter in the instant case the person ordering the supplies, that is to say, the master, was not without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor. The case presented here is different from that of the Eureka (209 Fed. 373) because in that case the option to purchase provided that the holder of the option, though given possession of the vessel, should not incur any lien upon her, nor make any purchases on her account. The present charter contains no such provision, but on the contrary by its very terms contemplates that the charterer should have authority to bind the vessel, and the owners having executed such a charter and delivered the vessel thereunder, were thereafter without power to prevent the creation of the liens provided for by the Act above mentioned,—their remedy being against the charterer upon his agreement to hold them harmless from such liens.

A decree will be entered for the amount prayed for.

June 7th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 7, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [103]

In the District Court of the United States, for the Northern District of California.

At a stated term of the District Court of the United States of America, for the Northern District of California, held in the City and County of San Francisco, on Thursday, the 8th day of June, one thousand nine hundred and sixteen. Present: M. T. DOOLING, District Judge.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,
Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,
Claimant.

Final Decree.

The above-entitled cause having come on regularly for hearing and having been heard upon the pleadings and proofs, and having been argued and submitted by the proctors for the respective parties, and, in accordance with the opinion heretofore filed herein, and the stipulation dated December 23, 1915, entered into between the proctors for the respective parties hereto, and due deliberation having been had, on motion of Ira S. Lillick Esq., proctor for libelant, it is

Orderd that the libelant, J. C. Rudbach, do have and recover in this action against the steamer "South Coast," etc., the sum of Fourteen Hundred Seventy-four and 55/100 Dollars ($1474.55), being the amount prayed for in the libel on file herein, including interest on said amount from the first day of November, 1915, to the date hereof, at the rate of seven (7) per **[104]** cent per annum, and that said libelant do have and recover against the said vessel the said sum, with interest thereon at the rate of seven (7) per cent per annum from the date hereof and until paid, together with libelant's costs to be taxed;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that, in accordance with the terms of the stipulation hereinbefore referred to, the following named claimants do have and recover against the said steamer the respective amounts hereinafter set opposite their respective names, with interest thereon at the rate of seven (7) per cent per annum from the first day of September, 1915, and until paid:

NAMES:	AMOUNTS.
M. G. Didricksen	$ 7.
H. Ekrem	7.25
Montgomery & Buckley	9.
Los Angeles Boiler Works	1.50

NAMES:	AMOUNTS.
Al Larson	16.36
A. Young	12.
San Pedro Marine-Engine Works	136.75
W. B. Hipple Machine Shop	622.06

M. T. DOOLING,
District Judge.

San Francisco, California, June 8, 1916.

Reserving all rights to appeal from the decree herein, the undersigned, proctors for the claimant, South Coast Steamship Co., hereby stipulate that, in accordance with the agreements entered into upon the 23d day of December, 1915, between the proctors for the respective parties hereto, the said decree may provide for the entry of judgment against the steamer "South Coast," for the sums set opposite the respective names of the claimants named in said decree, other than the libelant.

MARCEL E. CERF,
C. H. SOOY,
Proctors for Claimant, South Coast Steamship Co.

[Endorsed]: Filed Jun. 8, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [105]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," etc.,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,

Claimant.

Notice of Appeal.

To the Clerk of said Court and to Ira S. Lillick, Proctor for Libelant:

Please take notice that South Coast Steamship Co., a corporation, claimant in the above-entitled libel, hereby appeals to the next United States Circuit Court of Appeals for the Ninth Circuit, to be held in and for said Circuit, at the City and County of San Francisco, in the Northern District of California, from the final decree made and entered in said libel on the 8th day of June, 1916.

Dated at San Francisco, California, this 17th day of June, 1916.

MARCEL E. CERF,

C. H. SOOY,

Proctors for Claimant and Appellant.

Received copy of within Notice of Appeal, June 17, 1916.

IRA S. LILLICK,

Proctor for Libelant.

[Endorsed]: Filed Jun. 17, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[106]**

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant and Appellee,

vs.

The Steamer "SOUTH COAST," etc.,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,

Claimant and Appellant.

Assignment of Errors.

South Coast Steamship Company, a corporation, claimant in the above-entitled libel, hereby assigns error to the decree of the District Court of the United States in and for the Northern District of California, First Division, in the said libel, in the particulars hereinafter specified:

1st. The Court erred in holding that the persons who ordered the supplies furnished by the libelant, were authorized to bind the vessel, the steamship "South Coast," therefor.

2d. The Court erred in holding that the persons who ordered the supplies furnished by the libelant, were not without authority to bind the vessel, the steamship "South Coast," therefor.

3d. The Court erred in holding that the charterer of said vessel was not deprived of authority to bind the vessel for the expenses incurred in operating her.

4th. The Court erred in holding that the person ordering the supplies furnished by the libelant, that is the master of the vessel, the steamship "South Coast," was not without authority to bind the vessel therefor.

5th. The Court erred in holding that in order that a **[107]** vessel shall not be subject to a lien for supplies furnished at the instance of a charterer, it is essential and fundamental to provide by the terms of the charter-party, that the charterer or the master appointed by him, should be without authority to bind the vessel therefor.

6th. The Court erred in holding that the charter-party by which the vessel, the steamship "South Coast," was chartered to Levick contained no such provision, as one whereby the charterer, though given possession of the vessel, should not incur any lien upon her, or make any purchases on her account.

7th. The Court erred in holding that the charter-party, by its very terms, contemplates that the charterer should have authority to bind the vessel.

8th. The Court erred in holding that the libelant did not know or by the exercise of reasonable diligence could not have ascertained, that the persons ordering the supplies furnished by the libelant, were without authority to bind the vessel, the steamship "South Coast" therefor.

9th. The Court erred in not dismissing the libel with costs.

10th. The Court erred in entering a decree in favor of the libelant and against the steamship "South Coast."

11th. The Court erred in allowing interest at the rate of seven per cent per annum on the amounts which the Court found that the vessel should pay.

Dated June 26th, 1916.

MARCEL E. CERF,
C. H. SOOY,
Proctors for Claimant and Appellant.

Received a copy of within Assignment of Errors this June 26, 1916.

IRA S. LILLICK,
Proctor for Libelant and Appellee.

[Endorsed]: Filed Jun. 26, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[108]**

In the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,

Claimant.

Stipulation Regarding the Entry of Decree.

WHEREAS, a libel has been filed in the above-entitled court by J. C. Rudbach against the steamer "South Coast," for the reasons and causes in said libel mentioned; and

WHEREAS, M. G. Didricksen, H. Ekrem, Montgomery & Buckley, Los Angeles Boiler Works, Al Larson, A. Young, San Pedro Marine Engine Works and W. B. Hipple Machine-Shop, all being material and supply men of the city of San Pedro, State of California, furnished materials and supplies and performed repairs upon said steamer, "South Coast," during the period when said J. C. Rudbach also furnished materials to said vessel; and

WHEREAS, the claimants above named are all represented by Ira S. Lillick, the proctor representing the libelant in the above-entitled cause, and threaten to, and will unless some assurance is given them that their claims will be paid, file libels in intervention in the above-entitled cause, and cause the said steamer "South Coast" to be attached and seized under **[109]** process issued in said libels in intervention; and

WHEREAS, the parties to this stipulation and agreement desire to obviate the necessity of the costs attendant upon filing such libels in intervention on behalf of said claimants;

NOW, THEREFORE, IT IS HEREBY STIPULATED and agreed that liability for said demands of said claimants for materials and supplies to said steamer may be determined by such final decree rendered in the above-entitled cause by the said Court, or, in case of appeal, or writ of certiorari, by the court to which said cause may be appealed, or certified; and

In the event that said steamer "South Coast" shall be held under such decree to be liable to J. C. Rudbach for the materials and supplies furnished to her by him, amounting to $1,253.73 as prayed for in said libel of J. C. Rudbach, then, and in that event, and as a part of the decree entered in the above-entitled cause, the said decree may, and it shall, also provide for the entry of judgment against the said steamer "South Coast" in favor of the following named claimants in the amounts specified opposite each of their respective names, viz.:

M. G. Didricksen	$ 7.
H. Ekrem	7.25
Montgomery & Buckley	9.
Los Angeles Boiler Works	1.50
Al Larson	16.36
A. Young	12.
San Pedro Marine Engine Works	1.50
San Pedro Marine Engine Works	135.25
W. B. Hipple Machine-Shop	622.06

Dated, San Francisco, Cal., December 23, 1915.
SOUTH COAST STEAMSHIP COMPANY.
By C. H. SOOY,
Secretary.

H. EKREM,
M. G. DIDRICKSEN,
JOHN MONTGOMERY. [110]
W. M. PARKER, JR.,
SAN PEDRO MARINE ENG. WKS.,
A. YOUNG,
W. B. HIPPLE MACHINE-SHOP,
W. B. HIPPLE, Prop.
MARCEL E. CERF,
H. W. GLENSOR,
C. H. SOOY,
Proctors for Claimant, South Coast Steamship Co.
IRA S. LILLICK,
Proctor for Claimants Above Named.

San Francisco, Cal., December 23, 1915.

To Ira S. Lillick, Esq., Proctor for M. G. Didricksen, H. Ekrem, Montgomery & Buckley, Los Angeles Boiler Works, A. Larson, A. Young, San Pedro Marine Engine Works and W. B. Hipple Machine-Shop:

In consideration of your not filing libels against the steamer "South Coast," in order to attempt to recover the amounts claimed to be due the above-named claimants from the steamer "South Coast," and in further consideration of your signing the stipulation hereto annexed, the undersigned hereby agrees to hold out of any money realized from the sale of the steamer "South Coast," or from any insurance or charter money paid the South Coast Steamship Co., by reason of its ownership of said vessel, a sufficient amount to pay the claimants above named, with such interest as may be provided by such decree as may be entered in the case of Rudbach vs. the Steamer "South Coast," referred to in said stipulation.

SOUTH COAST STEAMSHIP COMPANY.
By C. H. SOOY.
MARCEL E. CERF.
H. W. GLENSOR. (Seal)
H. EKREM.
M. F. DIDRICKSEN.
W. M. PARKER, JR.
SAN PEDRO MARINE ENG. WKS.
A. YOUNG,
W. B. HIPPLE MACHINE-SHOP.
W. B. HIPPLE, Prop.

[Endorsed]: Presented in open court and filed March 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[111]**

CLAIMANT'S EXHIBIT "B."

June 26, 1915.

Mr. E. A. Mills,
Pacific Wharf & Warehouse Co.,
East San Pedro, Cal.

Dear Sir: Under the provisions of charter and option given by the South Coast Steamship Co., the owner of the S. S. South Coast, to Mr. Levick, the repairs now being made to this vessel are to be made for the credit of Mr. Levick and not upon the credit of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you, or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify all persons furnishing said supplies, labor or materials to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested, and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters, because if we wrote it it might in someway injure Mr. Levick, and this I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am,

Very truly yours, [112]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,

Respondent.

SOUTH COAST STEAMSHIP COMPANY, a Corporation,

Claimant.

Stipulation and Order Extending Time to File Apostles to August 16, 1916.

It is hereby stipulated and agreed by and between the parties hereto that the appellant, South Coast Steamship Company, may have to and including the 16th day of August, 1916, within which to file its apostles on appeal in the above-entitled action.

Dated July 17, 1916.

IRA S. LILLICK,
Proctors for Libelant and Respondent.
MARCEL E. CERF,
C. H. SOOY,
Proctors for Claimant and Appellant.

By the Court:
It is so ordered.
Dated July 17, 1916.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Jul. 17, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [113]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,

Claimant.

Stipulation and Order Extending Time to File Apostles to September 16, 1916.

It is hereby stipulated and agreed by and between the parties hereto that the appellant, South Coast Steamship Company, may have to and including the 16th day of September, 1916, within which to file its apostles on appeal in the above-entitled action.

Dated August 16, 1916.

IRA S. LILLICK,
Proctor for Libelant and Respondent.
MARCEL E. CERF,
C. H. SOOY,
Proctors for Claimant and Appellant.

By the Court:

It is so ordered.

Dated August 16, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Aug. 16, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[114]**

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,

Respondent.

SOUTH COAST STEAMSHIP COMPANY, a Corporation,

Claimant.

Stipulation and Order Extending Time to File Apostles to October 1, 1916.

It is hereby stipulated and agreed by and between the parties hereto that the claimant and appellant in the above-entitled action may have to and including the 1st day of October, 1916, within which to file its apostles on appeal in the said action.

Dated September 18, 1916.

IRA S. LILLICK,
Proctor for Respondent.
MARCEL E. CERF,
C. H. SOOY,
Proctors for Appellant.

By the Court:

It is so ordered.

Dated September 18, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sep. 18, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[115]**

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing 115 pages, numbered from 1 to 115, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the case of J. C. Rudbach, vs. The Steamer "South Coast," etc., No. 15,939, as the same now remain on file and of record in this office, said Transcript having been prepared pursuant to and in accordance with the Praecipe, (copy of which is embodied in this transcript), and the instructions of the proctors for respondent and appellant herein.

I further certify that the costs for preparing and certifying the foregoing Apostles on Appeal is the sum of Sixty Dollars and Twenty Cents ($60.20), and that the same has been paid to me by the proctors for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of Sept., A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. **[116]**

[Endorsed]: No. 2865. United States Circuit Court of Appeals for the Ninth Circuit. South Coast Steamship Company, a Corporation, Claimant of the Steamer "South Coast," etc., Appellant, vs. J. C. Rudbach, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed September 30, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed October 28, 1916. F. D. Monckton, Clerk.

No. 2865

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTH COAST STEAMSHIP COMPANY, a
Corporation, Claimant of the Steamer
"SOUTH COAST," etc.,
Appellant.

vs.

J. C. RUDBACH,
Appellee.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

Libelant's Exhibit No. 1.

ORIGINAL.

Phones: Sunset 86. Home 84. 408 Beacon Street. **407 Front Street.**
San Pedro, California, August 11, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,
Successor to JOSEPH A. WELDT & CO.
Dealer in
Ship Chandlery and General Merchandise.
Naval Stores a Specialty.

AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

1 sk. Sugar 6.40 5# Powdered Sugar (8¢) .40	6.80
30# Coffee (22¢) 6.60 5# Tea (.30) 1.50	8.10
8 sk. Flour (1.85) 14.80 50# Rye Flour (4¢) 2.00	16.80
10# Corn Meal .35 20# Rolled Oats (4½¢) .90	1.25
1# Cinnamon .75 2# Pepper (.40) .80	1.55
1# Nutmeg 1.10 1# Mustard .40	1.50
1# Ginger .40 1# Sage .40 1# Tyme .50	1.30
1# Bay Leaves .25 1# Cayeme Pepper .50	.75
1# Curry Powder .50 1 Botl. Vanilla Ex. .75	1.25
1 Botl. Lemon Ex. .75 6 M. Yeast .25	1.00
50# Bbl. Cabin Butter (.34) 17.00 40# Crew Butter (.32) 12.80	29.80
1 Case Eggs (33) 9.90 17# Cheese (.18) 3.06	12.96
1½ Case Evap. Milk (3.35) 5.02 ½ Case Con. Milk (4.65) 2.33	7.35
10# Lima Beans (.07) .70 10# Split Peas (8¢) .80	1.50
5# Pearl Barley (.07) .35 5# Sago (.07) .35	.70
1 Bx. Soap 3.50 2 doz. T. Soap (.60) 1.20	4.70
25# Sal. Soda (.01½) .38 1 doz. Sapolia 1.00	1.38
½ doz. Lye .45 3 Pot Brushes (.05) .15	.60
1 pk. Tooth Picks .05 2 Hams 26½# (.18½¢) 4.90	4.95
Sides Bacon 34 # (.23) 7.82 ½ doz. Peas 55	8.37
1 doz. Corn 1.05 2# K. C. Baking Powder (.15) .30	1.35
1# Back. Soda .10 3 Botl. L. & P. Sauce (.30) .90	1.00
1 gal. Worchester Sauce 1.10 3 Botl. Catsup (.15) .45	1.55
1 gal. Catsup .50 1 gal Salad Oil .85	1.35
1 kg. Mix. Pickles 1.25 6 Botl. Chow Chow (.23) 1.38	2.63
1 gal. Vinegar & Jug .40 10# Apricots (.11) 1.10	1.50
10# Apples (.10) 1.00 10# Prunes (.10) 1.00	2.00
5# Currents (.11) .55 10# Raisens (.08) .80	1.35
1 Case Ass. Table Fruit 3.30 1 Case Ass. Pie Fruit 2.50	5.80
1 Bx. Spaghetti .75 1 Bx. Vemnelli .75	1.50
10# Rice (.06) .60 6# Corn Starch (.06) .36	.96
2 doz. String Beans (1.10) 2.20 2 doz. Tomatoes (.95) 1.90	4.10
15# White Beans (.06) .90 15# Pink Beans (.05½) .83	1.73

1 doz. Mince Meat 1.10 1 doz. Clams 1.65................	2.75	
1 doz. Oysters 1.85 2 doz. Salmon 2.80.....................	4.65	
1 kit tongs & Sounds 1.50 1 kit Salmon Bellies 1.35......	2.85	
1 kit Mackeroll 1.45....................................	1.45	
40# Codfish (.07½) 3.00 1 Bx. Macaroni .75..............	3.75	
20# Compound (.11) 2.20 1 gal. Syrup .50..............	2.70	
1 gal. Mollasses .60 ¼ Sodas .85........................	1.45	
2/4 Pilot Bread (.80) 1.60 ¼ Ass. Cakes 3.20..............	4.80	
1 Gross Safety Matches .50 2# Salt .50..................	1.00	
3 Shaker Salt (.10) .30 50 Cans Sardines (8.50) 4.25......	4.55	
		169.38

Phones: Sunset 86. Home 84. 408 Beacon Street, 407 Front Street.
San Pedro, California, August 11, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,

Successor to JOSEPH A. WELDT & CO.

Dealer in

Ship Chandlery and General Merchandise.

Naval Stores a Specialty.

AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

1 doz. Jellies 2.15 1 doz. Jams 2.15......................	4.30	
1 doz. Booth Sardines 2.25 1 doz. 2# Corned Beef 5.25....	7.50	
1 doz. Soups 1.10 1 Botl. French Mustard .25............	1.35	
3 Cans Mushroom (.25) .75 1—3x2 U. S. Flag 1.25........	2.00	
1½ doz. Water Glasses (.60) .90 1 Mop .35................	1.25	
1 Mop Handle .35 1 Dinner Bell 1.35.....................	1.70	
1 Broom .55 2 Whisp Brooms (.25) .50..................	1.05	
1 doz. Brass Cup Hooks .25 1 Dust Broom .65............	.90	
		20.05
Carried forward		169.38
		189.43
Pictures frames 10¾ by 21¼		3.10
		192.53

JOHN ROBERTS.
O. K.

ORIGINAL.

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.
San Pedro, California, August 11, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,

Successor to JOSEPH A. WELDT & CO.

Dealer in

Ship Chandlery and General Merchandise.

Naval Stores a Specialty.

AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

4 doz. Eastside	6.00
1½ case C. B.	18.00
½ doz. Scotch	7.50
1½ case Lyndale	15.00
1 doz. Port	4.50
1 " Sherry	4.50
1 Bot. Bitters	.85
50 Cigars	2.25
	58.60

JOHN ROBERTS.
O. K.

[Endorsed]: U. S. Dist. Court. No. 15,939. Rudbach vs. "South Coast." Lib. Exhibit No. 1. Filed Mch. 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 2865. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit 1. Recd. and Filed Sep. 30, 1916. F. D. Monckton, Clerk.

Libelant's Exhibit No. 2.

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.
San Pedro, California, Aug. 28, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,
Successor to JOSEPH A. WELDT & CO.
Dealer in
Ship Chandlery and General Merchandise.
Naval Stores a Specialty.
AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

Aug. 20	6—3" Br. Gate Hooks .35 3—4" Br. G. Hooks .25	.60
	1# Calk Cotton .25 1# 33 Latch 1.25	1.50
	2 Yale Latches 1.75 & 1.25	3.00
	1 Clock 5.50 1 Big Ben Clock 2.50	8.00
	1 Drawer Lock	.50
23	62—⅜" x 1" Mach. Bolts 1¼¢	.77
24	5½# Rubber Packing 65¢	3.58
	1# ⅜" Blk. Washers	.08
	8# 36" x 45" Packing 65¢	5.20
25	1—4 to 2 Blk. Bushing .25 2—4" G. Plugs (42¢) .84	1.09
	4—1¼" Blk. Rail flange 15¢	.60
	1—2½" Hose Reducer	1.35
	2 doz. 7/16" x 1½" Mach. Bolts 1½¢	.36
	¾ # ½" Galv. Cl. Rings .10 1 Bushing 6–2 .75	.85
	2—1½" x 2" B. Bushing 8¢	.16
	2—7/16" x 1½" Stove Bolt	.05
26	1 Picture frame complete	1.50
28	6—¾" G. Shakel (55¢) 3.30 ½ doz. Dry Cells (35¢) 2.10	5.40
	6 Bat. Con. 25 2—4" Pipe Plugs (25¢) .50	.75
31	3 Galley Lamps (3.00) 9.00 30# 5" Wire Nails (5¢) 1.50	10.50
	12 Dry Cells (35¢) 4.20 2 Water Pitcher (1.10) 2.20	6.40
	3 Wash Basins (30¢) .90 3 Water Recept (95¢) 2.85	3.75
	3 doz. Br. Screws (12¢) .36 Putting up Stove 3.00	3.36
	6 Battery Con. 25 2—¾" x 3" M. Bolts .15	.40
		59.75

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.
San Pedro, California, Sept. 6, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,
Successor to JOSEPH A. WELDT & CO.
Dealer in
Ship Chandlery and General Merchandise.
Naval Stores a Specialty.
AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and
Heath & Milligan's Best Paints.

	Carried forward		59.75
Aug. 31	Brought forward	59.75	
Sept. 6	2 galv. Deck Buckets .55	1.10	
	6 c. Lye .45 1—2 gal. Coal Oil Can .40	.85	
	20# 1" galv. Tacks .15	3.00	
	20 ft. Wire (3¢) .60 1 Barometer 10.00	10.60	
	1 Coil 2½" Manila 148# .13¢	19.24	
	100# Ass't. W. Nails 3.75 1 Case Head Oil 2.80	6.55	
	3 Hanks (5# 30¢) Fish line	1.50	
	12 Dry Cells 35¢	4.20	
	1 Bbl. Engine Oil 53 gal. 33¢	17.49	
	1 Case Headlight Oil 10 gal. 28¢	2.80	
	50# Rags (5½¢) 2.75 50# W. Lead (8½¢) 4.25	7.00	
	1 sk. Cement	.90	
	24 Elec. globes 15¢	3.60	
			138.58
	Overtime delivering stores		5.50
			144.08

O. K.
P. L. LARSSON.

[Endorsed]: U. S. Dist. Court. No. 15,939. Rudbach vs. "South Coast." Lib. Exhibit No. 2. Filed Mch. 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 2865. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit 2. Recd. and Filed Sep. 30, 1916. F. D. Monckton, Clerk.

Libelant's Exhibit No. 3.

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.
San Pedro, California, Sept. 6, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,
Successor to JOSEPH A. WELDT & CO.
Dealer in
Ship Chandlery and General Merchandise.
Naval Stores a Specialty. Steward.

AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

Aug. 28	150# Sugar (6.40) 9.60 50# Coffee (22¢) 11.00	20.60
	5# Chocolate (28¢) 1.40 20# Corn Meal .70	2.10
	11 Sks. Flour 1.85	20.35
	50# Ro. Oats (4½¢) 2.25 1 Bot. Vanilla .75	3.00
	1 Bot. Lemon Ex. .75 1 Bot. Egg Coloring .50	1.25
	2 Doz. Mag. Yeast 1.00 1 Case Table Fruit 3.30	4.30
	5# Royal Baking Powder 40¢	2.00
	1 Gal. Salad Oil .85 1 Case Corn 2.10	2.95
	2 " Tom. Catsup (50¢) 1.00 1 Keg Pickles 1.25	2.25
	1 Case St. Beans 2.20 1 Case Peas 2.20	4.40
	2 " Tomatoes (1.95) 3.90 1 Doz Clams 1.65	5.55
	1 doz. Oysters 1.85 2 doz. Sardines (2.25) 4.50	6.35
	2 Bbl. Beef 19.00 & 25.00	44.00
	1 " Pork	26.00
	2 Kits T. & Sounds (1.50) 3.00 2 Kits Sal. Bellies 2.70	5.70
	25# Codfish (7½¢) 1.88 1 Box Macaroni .75	2.63
	1 Box Spagetti .75 50# Rice (6¢) 3.00	3.75
	2 doz. Corn Starch (6¢) 1.44 1 doz. Gelatine 1.50	2.94
	50# Cabin Butter (33¢) 16.50 1 Case Eggs (34¢) 10.20	26.70
	24½# Cheese 18¢	4.41
	4 Case Evap. Milk 3.35	13.40
	25# W. Beans (6¢) 1.50 25# B. Beans (5½¢) 1.38	2.88
	25# Split Peas (8¢) 2.00 10# Sago (7¢) .70	2.70
	1 Box. Soap 3.50 2 doz. T. Soap (60¢) 1.20	4.70
	1 pk. Toothpick .05 6 Toilet Paper .36	.41
	76½# Ham (21¢) 16.07 1 gal. Syrup .50	16.57

54# Bacon (18½¢) 9.99 1 gr. Matches .55	10.54	
30# Lard (15¢) 3.60 10# Cook. Salr. .20	3.80	
1 Box Crackers .85 1 Box Ass't. Cakes 3.20	4.05	
3# Bak. Soda (7¢) .21 Mustard .40 10# Apricots .90	1.51	
20# Apples (10¢) 2.00 25# Prunes (10¢) 2.50	4.50	
1 Bot. Curry Powder .75 1 Case Soup 4.35	5.10	
1160# Spuds 1¼¢	14.50	
1 Garbage Cans 1.70 Fixing stove 3.00	4.70	
1 sk. ½ gr. Salt	.50	
	———	281.09

O. K.
P. L. LARSSON.

[Endorsed]: U. S. Dist. Court. No. 15,939. Rudbach vs. "South Coast." Lib. Exhibit No. 3. Filed Mch. 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 2865. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit 3. Recd. and Filed Sep. 30, 1916. F. D. Monckton, Clerk.

Libelant's Exhibit No. 4.

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.
San Pedro, California, Oct. 18, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,
Successor to JOSEPH A. WELDT & CO.
Dealer in
Ship Chandlery and General Merchandise.
Naval Stores a Specialty. Deck.
AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

Oct. 6	2 sks. Coal	1.60	
	5 gal. Hull Black 1.60	8.00	
	3 Deck Brooms .35	1.05	
" 18	1 Set Signals	53.65	
	5 gal. Stack Paint 1.80	9.00	
	50 yds. #3 Canvas 35¢	17.50	
	6 2 x 2 Cap Screw 24 fr. 9¢	2.16	
	½ doz. Cup Hooks	.15	
	1 " C. & H. Hooks	.15	
	1 gal. Sat. Enamel	2.75	
	2 Roping Needles	.20	
	2 Sewing Palm 25¢	.50	
	3—6" Shears 40¢	1.20	
	3—8" Single Galv. Blocks 1.65	4.95	
	1—8" Double "	2.45	
	12 Tall Pins	.60	
	5# Marlin 30¢	1.50	
	20 gal. Black Paint 1.60	32.00	
	3—4" Paint Brushes 1.45	4.35	
	1 Claw Hammer	.65	
	12 Parent links ⅝"	1.20	
	5 gal. I. W. Paint 2.10	10.50	
	2½ doz. Br. Screws .15	.38	
	1# American Ver. Red	.60	
			157.09

O. K.
Capt. F. M. JOHNSON.

[Endorsed]: U. S. District Court. No. 15,939. Rudbach vs. "South Coast." Lib. Exhibit No. 4. Filed Mch. 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 2865. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit 4. Recd. and Filed Sep. 30, 1916. F. D. Monckton, Clerk.

Libelant's Exhibit No. 5.

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.
San Pedro, California, Oct. 18, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,
Successor to JOSEPH A. WELDT & CO.
Dealer in
Ship Chandlery and General Merchandise.
Naval Stores a Specialty. Engineer.
AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

Oct. 18	1—2" Br. Hose Nipple	1.25	
	2—2" Male Couplings .90	1.80	
	4 Len. 2" Galv. Pipe 81 ft. 2"	17.85	
	6—2" 45° Elbows .60	3.60	
	6—2" Elbows 51¢	3.06	
	2—2" x 1½" Street Elb. 81¢	1.62	
	2—½" x ¼" " " 18¢	.36	
	2—1½" x 1¼" " " 42¢	.84	
	2—1¼" x 1" " " 34¢	.68	
	3—2" Plugs 12¢	.36	
	1—1" "	.05	
	3—2" x 6" Nipples 30¢	.90	
	3—2" x 4" " 24¢	.72	
	1 Block Selbys Babbit Metal 3# 60¢	1.80	
	1 Quire #0 Emery	1.00	
	1—1" Lunk Globe Valve	1.80	
	1 Box ¼" Flax Packing 9# 30¢	2.70	40.39
Oct. 20	3 Len. ¾" Galv. Pipe 63 ft. 2 in. 7¢	4.42	
	3—2" Stop Cocks 3.75	11.25	
	1—1" " "	1.70	
	2—2" Hose Band 25	.50	
	10 Inches 2" Hose	.55	
			18.42
			58.81
	1 Sheet Taggert Tin		.15
			58.96

O. K.
Capt. F. M. JOHNSON.

[Endorsed]: U. S. Dist. Court. No. 15,939. Rudbach vs. "South Coast." Lib. Exhibit No. 5. Filed Mch. 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No. 2865. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit 5. Recd. and Filed Sep. 30, 1916. F. D. Monckton, Clerk.

Libelant's Exhibit No. 6.

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.
San Pedro, California, Oct. 18, 1915.

M S. S. "South Coast" & Owners,
Bought of J. C. RUDBACH,
Successor to JOSEPH A. WELDT & CO.
Dealer in
Ship Chandlery and General Merchandise.
Naval Stores a Specialty. Steward.
AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and
Heath & Milligan's Best Paints.

Oct. 18	1 gal. Salad Oil .80 6 Box Chow 1.40	2.20
	1 Keg Mix. Pickles 1.35 6 Box Horse Radish .55	190
	1 doz. Saurkraut 1.15 1 Case Corn 2.10	3.25
	1 Case St. Beans 2.20 1 " Peas 2.20	4.40
	2 " Tomatoes 3.40 1 " Soup 4.35	7.75
	1 " Sausage Meat 6.50 1 Case Vien Sausage 5.00	11.50
	1 doz. Clams 1.65 1 doz. Oysters 1.95 1 doz. Salmon 1.35	4.95
	3 doz. Monterey Sardines (2.10) 6.30 1 Bbl. Beef 19.00	25.30
	1 Bbl. Pork 27.50 100# Codfish 8.00 1 Box Macaroni .75	36.25
	1 Box Spagetti .75 1 Box Vermicelli .75 50# Rice (6¢) 3.00	4.50
	1 doz. Corn Starch .72 2 doz. Gelatine 2.80	3.52
	1 Case Eggs (37¢) 8.10 60# Cabin Butter (33¢) 19.80	27.90
	40# Crew Butter (29¢) 11.60 16# Or. Cheese (18¢) 2.88 30# B. Beans (6¢) 1.80	16.28
	5 Case Milk (3.35) 16.75 50# W. Beans (5½¢) 2.75	19.50
	25# Split Peas (8¢) 2.00 10# Barley .60 10# Sago .60	3.20
	10# Tapioca .60 12 pk. Gold Dust 2.64	3.24
	2 doz. T. Soap 1.20 2 doz. Sapolio (95¢) 1.90 6 Cl. Lime .50	3.60
	1 doz. Lye .90 1 Cabin Broom .55 3 T. Picks .15.	1.60
	12 T. Paper .72 2000 Napkins 2.30	3.02
	58# Hams (22¢) 12.76 54½# Bacon (24¢) 13.08	25.84
	5/10# Lard (15¢) 7.50 1 gal. Syrup .50 ¼ Sodas .90	8.90
	¼ Pilot Bread .80 2 gr. Safety Matches 1.10	1.90
	3 Table Salt .30 50# Salt .65 1 Box Fr.	

Apples 1.05	2.00	
25# Prunes (10¢) 2.50 25# Dr. Apples (9¢) 2.25 15# Figs 1.05	5.80	
10# Apricots 1.00 10# Raisins .80 10# Currants 1.10	2.90	
1392# Spuds (1.50) 20.88 2 sks. Sugar 11.10 5# Tea 1.50	33.48	
50# Gr. Coffee (21¢) 10.50 12 sks. Flour (1.65) 19.80 2 sks. Rye 3.70	34.00	
10# Corn Meal .35 50# Ro. Oats 2.00 2# Pepper 1.30	3.65	
1# Mustard .40 2# Curry 1.00 1 Bot. Egg Color. .35	1.75	
12 Magic Yeast .50 1 Case Pie Fruit 2.50	3.00	
2 Bot. Lemon Ex. 1.50 2 Bot. Vanilla 1.50 1 Case F. Fruit 3.20	6.20	
1 doz. Jam 2.20 1 doz. Jelly 2.20 1 gal. Wos. Sauce .90	5.30	
2 gal. Tom. Catsup 1.00 12 Bot. Beef Ex. 5.35	6.35	
		324.93

Phones: Sunset 86. Home 84. 408 Beacon Street. 407 Front Street.

San Pedro, California, Oct. 20, 1915.

M S. S. "South Coast" & Owners,

Bought of J. C. RUDBACH,

Successor to JOSEPH A. WELDT & CO.

Dealer in

Ship Chandlery and General Merchandise.

Naval Stores a Specialty. Steward.

AGENT FOR CRAIG'S DRY DOCK, Cape Cod Copper Paint and Heath & Milligan's Best Paints.

Oct. 19	Balance forwarded	324.93	
" 20	5# Schillings Baking Powder 40¢	2.00	
	2 Pot Covers	.20	
	1 Stock Pot	3.75	
			330.88
Oct. 21	1½ Case Cedar Brook Whiskey		22.50
	2/4 Gordons Gin 1.50		3.00
	4/4 B. & W. Scotch 1.25		5.00
			361.38

O. K.

Capt. F. M. JOHNSON.

[Endorsed]: U. S. Dist. Court. No 15,939. Rudbach vs. "South Coast." Lib. Exhibit No. 6. Filed Mch. 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

No 2865. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit 6. Filed Sep. 30, 1916. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the 15th day of March, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, presiding; The Honorable WILLIAM H. HUNT, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, a Corporation,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

Order of Submission.

By consent of counsel for the appellee, and upon motion of Mr. Marcel E. Cerf, counsel for the appellant, and good cause therefor appearing, ORDERED, appeal in the above-entitled cause submitted to the Court for consideration and decision, on briefs on file.

At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday the 1st day of October, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert and William H. Hunt, Circuit Judges, and Charles E. Wolverton, District Judge, before whom the cases were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * South Coast Steamship Company, a Corporation, Appellant, vs. J. C. Rudbach, Appellee. No. 2865. * * *

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamer "SOUTH COAST," etc.,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

Opinion U. S. Circuit Court of Appeals.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

MARCEL E. CERF and C. H. SOOY, for Appellant.

IRA S. LILLICK, for Appellee.

On June 19, 1915, the South Coast Steamship Company chartered to Howard R. Levick, Jr., with the right of purchase, the steam schooner "South Coast," on terms and conditions set forth in the charter-party, which contains, among others, the following provisions:

> "Fifth: It is understood that this charter is a charter of the bare vessel, and that said party of the second part shall furnish the crew, pay their wages, victual them, furnish all deck and engine-room and saloon stores and supplies of every kind and nature; pay for all fuel, fresh

> water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, overtime of crew, agencies, commissions, consular charges, drydocking, painting of the hull of said vessel, furnishing all lines and slings, and pay all other charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter."

By the sixth paragraph the owner is accorded the right to appoint the master, who is to be under the orders of the charterer as to the management of the ship, and whose wages are to be paid by the charterer.

By the eighth paragraph, in default of any payment, or upon failure on the part of the charterer, within thirty days after incurring the same, to discharge any debts or liabilities which are liens on the vessel, the owner is given the right to withdraw the vessel from the service of the charterer.

By the tenth paragraph it is provided that, if the payments (charter hire) are not made, then, at the option of the owner, the vessel shall be delivered to it, "free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the first part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith."

As to the further facts, we adopt the statement of the trial court, as follows:

> "Libelant furnished supplies at various times to the steamer 'South Coast,' in the harbor of San Pedro, each time on the order of the person then her master. The vessel was during this period being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant, before furnishing any of the supplies in question, was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners; and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed

him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy, one of the owners, not to deliver any goods on the credit of the ship. So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given."

WOLVERTON, District Judge:

Prior to the adoption of the Act of Congress of June 23, 1910 (36 Stat. L. 604), relating to liens upon vessels for repairs, supplies, or other necessaries, there was much confusion respecting the law, as to whether a lien would attach where the necessaries and supplies, etc., were ordered by the master when the owner was personally present, or whether such a lien was susceptible of being impressed orally by the owner in case the supplies, etc., were furnished through his personal order on the credit of the ship. In the first instance, it was thought that it would not attach because, the owner being present, the presumption seemed to prevail that there was want of authority in the master to bind the vessel. But, if the ship were in a foreign port and the owner were not present, the authority of the master to bind the ship would exist through necessity, that the ship might be repaired and provisioned in order to go forward upon its voyage. Thomas et al. v. Osborn, 19 How. 22; The Kalorama, 10 Wall. 204, 212, 213; The Underwriter, 119 Fed. 713, 755.

In the second instance, according to many authorities, the personal order of the owner gave rise to the presumption that the supplies were furnished on his personal credit. The St. Jago de Cuba, 9 Wheat. 409. And it was not even clear that the owner could impose a lien upon the vessel by oral agreement. The Iris, 100 Fed. 104; Cuddy v. Clement, 113 Fed. 454. But all this controversy has been put at rest, or rather obviated, by the statute, which imposes a lien in favor of the person furnishing repairs, supplies, etc., "upon the order of the owner or owners, * * * or of a person by him or them authorized." The lien follows, therefore, in any event, where the repairs or supplies are furnished by direction of the owner, though by the fourth section of the act it may be waived on the part of the furnisher of such repairs, supplies, etc., by agreement or otherwise. By the second section, the master, among others, is presumed to have authority from the owner to procure repairs, etc., and, by the third, the presumption is declared to extend to such officers and agent "when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel." So that one who disputes the validity of a supposed lien claimed for repairs, etc., furnished on the order of the master, is required to overcome the presumption which the law imposes of the master's authority to represent the owner respecting the particular involved. In other words, the presumption imposed by the statute is disputable in character, and it has been held that it is but declaratory of a principle previously recognized in maritime jurisprudence. The Yankee, 223 Fed. 919.

There is a divergence of opinion among the cases as to whether a charter-party of the nature and character of the one here involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc. Judge Lowell has held, in a most learned and searching opinion, that it does. The Underwriter, *supra.* But this decision is disapproved by the Circuit Court of Appeals of his circuit in the case of The Surprise, 129 Fed. 873, which impresses us as being based upon the stronger reasoning. The Court there says:

> "We should also observe that much has been made of the fact that, in The Kate and The Valencia, there were formal charter-parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in The Kate and The Valencia. The charter is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement as effectual in law as an express one. Moreover, so far as concerns knowledge on the

part of a merchant of a charter-party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because, if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations *pro* and *con* exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on The Kate and The Valencia, regardless of the fact whether there was a formal charter, or only an oral one without any express statement of the terms thereof." (Citing thereafter numerous cases.)

In Thomas et al. v. Osborn, *supra,* Mr. Justice Curtis has this to say:

> "Nor do we think the fact that the master was charterer and owner *pro hac vice* necessarily deprived him of this power. (The power to borrow money on the credit of the vessel for repairs and supplies.) It is true it does not exist in a place where the owner is present. (The St. Jago de Cuba, 9 Wheat. 409.) But this doctrine cannot be safely extended to the case of an owner *pro hac vice* in command of the vessel. Practically this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same

> power to borrow to meet that necessity, as if he were not charterer."

A little later the eminent jurist reaches this conclusion:

> "And so in this case, we think, the general owners must be taken to have consented that, if a case of necessity should arise in the course of any voyages which the master was carrying on for the joint benefit of themselves and himself, he might obtain, on the credit of the vessel, such supplies and repairs as should be needful to enable him to continue the joint adventure. This presumption of consent by the general owner is entertained by the law from the actual circumstances of the case, and from considerations of the convenience and necessities of the commercial world."

It seems to be settled law that, unless repairs and supplies are necessary to render the vessel seaworthy to enable her to proceed on her voyage, the master is not authorized, as between himself and the owners, to procure them on the credit either of the owners or of the vessel. But the necessity for credit will be presumed where it appears that the repairs and supplies were ordered by the master, and that they were then necessary for the ship when lying in port, or to fit her for an intended voyage, unless it be shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts, or one of them, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry, and to show that if he had used due diligence he would have ascertained that the master was not authorized to obtain any such relief upon the credit of the vessel. The Lulu, 10 Wall. 192, 203; The Kalorama, *supra.* This latter case added the element of good faith, on the part of the parties concerned, in the procuring and furnishing of such repairs and supplies.

In the case of The Kate, 164 U. S. 458, 469, the Court says:

> "The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libelant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required that he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libelant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts."

Based upon the principle, the following deduction was made:

> "If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnising them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less is one recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them."
>
> See, also, The Valencia, 165 U. S. 264.

It would appear, in view of these authorities, that the clause in the Act of Congress declaring that nothing contained therein "shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor," was intended as declarative of maritime law respecting the subject, as it existed prior to the enactment. It was not designed to ordain any new or different principle of law.

So that, under the law, the necessity for credit is presumed when it appears that the repairs, supplies, etc., were necessary and were ordered by the master; and, under the act, the authority of the master to represent the owner in procuring such repairs, etc., is also presumed. And these presumptions must prevail unless it be shown that the master did not represent the owner, or was not authorized to obtain any such relief on the credit of the vessel, and the furnisher knew or ought to have known the fact. This we take to be the rule, in view of the statute, read in the light of the law applicable as it existed previous to its enactment.

Now, coming to the instant controversy: The repairs and supplies in question were furnished on the order of the master. The master, who was appointed by the owner, was obliged, under the charter-party, to take his directions from the charterer. The libelant was apprised of the existence of the charter-party, and was warned by the owner not to furnish supplies on the ship's credit. The libelant, nevertheless, furnished the supplies, with the declaration to the owner's representative that he would not furnish them in any other way, or under any other conditions, than upon the credit of the ship.

It is the purpose of the statute, as it was the purpose of the law previous thereto, that the furnisher of such commodities as are necessary to enable a ship to enter upon or pursue her voyage, and to engage in maritime traffic, to which only she is adapted, shall have a lien on the ship therefor. It is in the interest of shipping, conducted upon maritime waters, that such should be the case, as otherwise credit would not be extended, upon the account of the owner or master alone, to enable the ship to discharge its peculiar function, and great inconvenience would follow, to the detriment and disadvantage, if not the ultimate disaster in large measure, of maritime shipping. Many ships sail under charter, either verbal or in form of regularly drawn charter-parties, and it is usual and customary for the charterer in either event to disburse the necessary expenses of the ship; and of this all persons furnishing supplies, etc., to a chartered ship must be deemed to have notice. But, notwithstanding this notice, or even knowledge that the ship is under charter, we cannot believe that it was the intendment of the statute or of the law that the furnisher should, because of that fact, be deprived of his lien when advancing necessary repairs or supplies in good faith to enable the ship to engage in her accustomed traffic. Nor do we believe that it was the intendment of the statute or of the law thus to impose so vital a hindrance upon maritime shipping, and unless there is something more in the charter-party, that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon, the master's ordinary authority is not impaired or abbreviated; nor can the right of the furnisher of repairs, etc., to extend credit to the ship, and his consequent lien, be so subverted.

The terms of the present charter-party as respects the furnishing of repairs, supplies, etc., are only those usual to most charter-parties, and by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel. True it is that the owner attempted to prevent the libelant from advancing the supplies on the credit of the vessel, but this was an invasion of the charterer's rights under the charter-party, and was unavailing to subvert the master's authority in the premises. As bearing upon the proposition, in addition to The Surprise, *supra*, see The Philadelphia, 75 Fed. 684.

Stress is laid upon The Kate and The Valencia, *supra,* as determinative of the present controversy. In The Kate, the coal, for the price of which the lien was filed, was furnished to the charterer under circumstances indicating, as was said in The Surprise, "that there never was any expectation of holding the vessel," and, as explained by the Supreme Court: "None of the coal furnished to the chartered vessels was ordered by the master of the vessel, nor were any of the bills therefor submitted to him for approval. They were submitted only to the steamship company. Nor did the agents of the chartered vessels know that coal was supplied by the libelant on the credit of the vessel, or that any specifications of lien were filed under the local statute." In other words, the dealing respecting the coal was always directly between the libelant and the steamship company, the charterer; the vessel at the same time having an agent within easy communication of the parties. The case practically hinged upon the condition that there was an element of fraud in the transaction of claiming the lien, to which the libelant was a party.

The Valencia is an analogous case. The present controversy is without any such element of fraud attributable to the libelant. These cases of The Kate and The Valencia are therefore without application further than they purport to state general maritime law.

The decree of the District Court will be affirmed.

[Endorsed]: Opinion. Filed Oct. 1, 1917. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamer "SOUTH COAST," etc.,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, First Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered October 1, 1917. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the 7th day of January, in the year of our Lord, one thousand nine hundred and eighteen. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; The Honorable WILLIAM C. VAN FLEET, District Judge; The Honorable JEREMIAH NETERER, District Judge.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, it is ORDERED that the Petition, filed Oct. 31, 1917, on behalf of the appellant for a rehearing of the above-entitled cause be, and the same hereby is, denied.

FURTHER ORDERED Mandate of this Court under Rule 32 in the above-entitled cause stayed for a period of twenty-five (25) days in addition to time allowed by said rule.

At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the 4th day of February, in the year of our Lord, one thousand nine hundred and eighteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, Claimant of the Steamer "SOUTH COAST," etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

Order Staying Issuance of Mandate.

Upon application of Mr. A. Robert Miller, on behalf of counsel for the appellant, and good cause therefor appearing, ORDERED Mandate of this Court under Rule 32 in the above-entitled cause stayed for a period of thirty (30) days from the 7th instant.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamer "SOUTH COAST," etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

Praecipe for Transcript of Record.

To the Clerk of the said Court:

Sir: Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals), and not less than nine uncertified copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a Writ of Certiorari under section 240 of the Judicial Code, in the above-entitled cause, the said Transcript to consist of a copy of the following:

1. Printed Apostles on Appeal on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had and of the papers that were filed in said Circuit Court of Appeals, viz:

2. Libelant's Exhibits 1, 2, 3, 4, 5 and 6, filed Sept. 30, 1916;

3. Order of Submission, Mar. 15, 1917;

4. Order Directing Filing of Opinion, etc., entered Oct. 1, 1917;

5. Opinion, filed Oct. 1, 1917;

6. Decree, filed and entered Oct. 1, 1917;

7. Order Denying Petition for Rehearing and Staying Issuance of Mandate 20 days in addition to time allowed by Rule, entered Jan. 7, 1918;

8. Order Staying Issuance of Mandate, entered Feb. 4, 1918;

9. Praecipe for Transcript of Record;

10. Certificate of Clerk U. S. Circuit Court of Appeals to said Transcript.

MARCEL E. CERF,
C. H. SOOY,
Proctors for the Appellant.

Service of a copy of the within praecipe is hereby admitted this 21st day of February, A. D. 1918.

IRA S. LILLICK,
Proctor for the Appellee.

[Endorsed]: Praecipe for Transcript of Record. Filed Feb. 23, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamer "SOUTH COAST," etc.,

Appellant,

vs.

J. C. RUDBACH,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and seventy-six (176) pages, numbered from and including 1 to and including 176, to be a full, true and correct copy of the record of the above-entitled case in the said Circuit Court of Appeals, including Libelant's Exhibits 1, 2, 3, 4, 5 and 6, and excluding Claimant's Exhibit "A" heretofore placed of record in said Circuit Court of Appeals, made pursuant to praecipe of counsel for the appellant, filed on the 23d day of February, A. D. 1918, and certified under section 3 of Rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this first day of March, A. D. 1918.

[Seal]

F. D. MONCKTON.
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which South Coast Steamship Company, Claimant of the Steamer "South Coast", etc., is appellant, and J. C. Rudbach is appellee, No. 2865, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the nineteenth day of April, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] Docketed. File No. 26,386. Supreme Court of the United States, No. 919, October Term, 1917. South Coast Steamship Company, Claimant, etc., vs. J. C. Rudbach. Writ of Certiorari. Docketed. No. 2865. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 31, 1918. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamer "South Coast," etc., Appellant,

vs.

J. C. RUDBACH, Appellee.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by and between the proctors of record in the above entitled cause that the Certified Transcript of Record now on file in the Supreme Court of the United States in the above cause No. 919, October Term, 1917, of said Supreme Court, shall stand as the return of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the Writ of Certiorari issued out of said

Supreme Court on the 19th day of April, 1918, and that the original exhibits in said cause now in the custody of said Circuit Court of Appeals may be transmitted by the Clerk of said Court to the Supreme Court of the United States as a part of said return.

Dated: May 4th, 1918.

MARCEL E. CERF,
C. H. SOOY,
Proctors for Appellant.
IRA S. LILLICK,
Proctors for Appellee.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

South Coast Steamship Company, a Corporation, Claimant of the Steamer "South Coast," etc., Appellant,

vs.

J. C. Rudbach, Appellee.

Order Directing Transmission of Original Exhibits to Clerk Supreme Court U. S.

Pursuant to the foregoing stipulation it is hereby Ordered that the Original Exhibits in above cause now in the custody of the clerk of this Court may be transmitted to the Supreme Court of the United States as original exhibits for the inspection of said court.

Dated: May 31, 1918.

(S'g'd) WM. H. HUNT,
United States Circuit Judge.

[Endorsed:] Stipulation as to Return to Writ of Certiorari, and Order Directing Transmission of Original Exhibits to Supreme Court U. S. Filed May 31, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

South Coast Steamship Company, a Corporation, Claimant of the Steamer "South Coast," etc., Appellant,

vs.

J. C. Rudbach, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari and Order from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding two pages, numbered 1 and 2, respectively, to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari, and Order Directing Transmission of Original Exhibits to Supreme Court U. S.", filed in the above-entitled cause on the 31st day of May, A. D. 1918, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 31st day of May, A. D. 1918.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2865.

SOUTH COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamer "South Coast," etc., Appellant,

vs.

J. C. RUDBACH, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed Writ of Certiorari, issued out of the Honorable the Supreme Court of the United States on the nineteenth day of April, A. D. 1918, and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, do attach to the said writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari and Order Directing Transmission of Original Exhibits to Supreme Court U. S.,"—the original of which said Stipulation and Order was filed in my office on the 31st day of May, A. D. 1918, and provides that the Transcript of Record now on file in said cause shall stand as the Return to the said Writ of Certiorari,—and, pursuant to said Stipulation and Order, have this day transmitted to the said Supreme Court, accompanying this Return, all of the Original Exhibits heretofore placed of record in my office in said cause, viz:

Libelant's Exhibits Nos. 1, 2, 3, 4, 5, 6, and Claimant's Exhibit "A".

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth

Circuit, at the City of San Francisco, in the State of California, this 31st day of May, A. D. 1918.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1917

No. 9[redacted]3[redacted]68

SOUTH COAST STEAMSHIP COMPANY
(a corporation),
Petitioner,

vs.

J. C. RUDBACH,
Respondent,
(Libelant below)

PETITION FOR WRIT OF CERTIORARI, BRIEF AND NOTICE OF SUBMISSION.

MARCEL E. CERF C. H. SOOY,
Proctors for Petitioner.

OLIVER DIBBLE,
Counsel.

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FIRST POINT.

Supplies furnished a chartered vessel when she is not in distress or in such a position that the supplies availed the owner as well as the charterer, cannot constitute the basis of a lien if the vessel were held under a charter-party which required the charterer to furnish the supplies and the furnisher knew the facts or by the exercise of reasonable diligence could have ascertained them. This principle as announced in the Act of June 23, 1910 (36 Stat. L. 605) "is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. (*The Yankee*, 233 Fed. 919, 926)....10 - 50

SECOND POINT.

A charter party which by its terms provides that it covers merely the bare vessel and expressly requires the charterer to pay all charges that may be incurred in or about the use of the vessel during the term of the charter-party, precludes a material-man with notice of the terms of the charter-party, from asserting a lien for supplies furnished the vessel upon the order of the master.................... 51

THIRD POINT.

The provision in a charter-party which requires the charterer to hold the owner harmless from any lien asserted for supplies furnished the vessel, is not tantamount to a declaration by the owner that such liens may be asserted; but, it is rather in the nature of a "prohibition added out of abundant caution"; and it should be considered that it "was placed in the charter-party for the benefit of the owner of the vessel" "and not for the solace of those furnishing supplies without reasonable investigation as to responsibility." ....52 - 54

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In the Supreme Court
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United States

OCTOBER TERM 1917

No.

SOUTH COAST STEAMSHIP COMPANY
(a corporation),
Petitioner,
vs.
J. C. RUDBACH,
Respondent,
(Libelant below.)

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Honorable the Associate Justices of the Supreme Court of the United States:

The petition of South Coast Steamship Company, the petitioner in the above entitled cause, respectfully shows unto this court as follows:

I.

This is a petition for a writ of certiorari to review a final conclusion of the Circuit Court of

Appeals for the Ninth Circuit, affirming a decree of the District Court of the United States for the Northern District of California, in an admiralty cause.

II.

The learned District Judge who tried the cause, stated the facts as follows:

> "Libelant furnished supplies at various times to the steamer 'South Coast' in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick, under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners; and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy one of the owners not to deliver any goods on the credit of the ship. So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the

credit of the ship, such warning was clearly and definitely given.

"The charter in question contains the following provisions:

'Fifth, It is understood that this charter is a charter of the bare vessel, and that the party of the second part (Levick) shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, overtime of crew; agencies, commissions, consular charges, dry docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter.'

'Tenth. Said party of the second part further covenants * * * that if said payments (charter hire) be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the second (first) part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs

> or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith' ". (Transcript of Record pp. 121 to 123.)

III.

The Circuit Court of Appeals in affirming the District Court's decree for the libelant, held:

1st. That the law applicable to this case was not altered by the Act of June 23, 1910 (36 Stat. L. 604). (This conclusion accords with petitioner's position.)

2nd. That there is a divergence among the cases as to whether a charter-party which requires the charterer to furnish supplies to the ship, withdraws from the master the power to order supplies for which the material-man, with knowledge of the terms of the charter-party, may assert a lien.

3rd. That the ship-owner's immunity from the necessity of paying the ship's bills does not relieve his ship from a like necessity.

4th. That the provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted for supplies furnished the ship, is tantamount to a declaration by the owner that such liens may be asserted.

IV.

The reasons on account of which the petitioner seeks a writ of certiorari are indicated, somewhat, in the opinion of the Circuit Court of Appeals. Therein it is pointed out that the:

> "terms of the present charter-party as respects the furnishing of repairs, supplies, etc., are * * * those usual to most charter parties".

Furthermore it is said in the opinion:

> "There is a divergence of opinion among the cases as to whether a charter-party of the nature and character of the one involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc".

It is the combination of these two features which renders this case one of utmost gravity and importance. We have a case for the interpretation of a charter-party whose form is current wherever navigable waters touch the land of the United States. And we have a case where the Circuit Court of Appeals has said there is a divergence of opinion among the courts as to the proper interpretation of this universally used form of charter-party.

The divergence, as we see it, results from the opinion in this case.

Precisely the conditions and facts here involved were presented to the Circuit Court of Appeals for the Second Circuit in *Kniffen & Demarest Company Cross Appeal* in *The Oceana,* (1917) 244 Fed. 80, and the court actually reached a perfectly contradictory result from the result reached in the instant case.

In *The Oceana* (1917) (supra) it was held:

> "The agreement of sale contained, among others, the following covenant by the vendee:
>
> '(5) Until said ship is completely paid for, the purchaser covenants as follows:
>
> '(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills for supplies and repairs to said ship, and exhibit at reasonable times the ship's accounts and bills to seller's representatives.'
>
> "*The libelants contend that this provision as to bonding is an authority to the vendee to create liens; but we regard it, on the contrary, as a prohibition added out of abundant caution.* (p. 81) * * *
>
> "The Morse Company, claimant, has assigned error to the decree in allowing any of the claims, and *Kniffen & Demarest Company have assigned error for dismissing their libel.* * * *
>
> "We agree with Judge Veeder that the Bermuda Company was a person intrusted with the management of the steamer within the meaning of Section 2 of the act, while she was lying in the vendor's yard, and that repairs, supplies, or other necessaries furnished between December 10th and 25th, when she was actually delivered and removed, are as much entitled to a lien as those furnished subsequently. *We also concur with his finding, and that of the commissioner, that Kniffen & Demarest Company had sufficient notice to put them on inquiry, and that therefore their libel was properly dismissed.*"

The Circuit Court of Appeals for the Seventh Circuit in *Northwestern Fuel Company v. Dunkley-Williams Company* (1909) 174 Fed. 121, a case identical with the instant case, reached a conclusion diametrically opposed to the conclusion reached in the present case.

The same observation applies when one compares the instant case with the masterly opinion of Judge Lowell in *The Underwriter,* (1902) 119 Fed. 713.*

The writ should be granted, we submit, in order thereby to avoid the conflict between the opinion of the Circuit Court of Appeals for the Ninth Circuit and the opinions of the courts of the other circuits.

Columbus Match Company v. Robins, 148 U. S. 266, 270;

Forsythe v. Hammond, 166 U. S. 504, 514-515;

Fields v. United States, 205 U. S. 292, 296.

WHEREFORE, your petitioner prays that this Honorable Court will cause a writ of certiorari to issue requiring the Circuit Court of Appeals for the Ninth Circuit to certify the whole record and cause to this court for hearing, and that thereupon this court will decide the matter in controversy between the parties as to this Honorable Court may seem just.

Dated, March 2, 1918.

SOUTH COAST STEAMSHIP COMPANY,
(Seal) By C. J. Roberts, ~~President~~ Secretary,
Petitioner.

MARCEL E. CERF C. H. SOOY,
Proctors for Petitioner.

OLIVER DIBBLE,
Counsel.

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* See, also, the authorities gathered at pages 12-13 of accompanying brief.

State of California,
City and County of San Francisco.—ss.

C. J. Roberts being duly sworn, deposes and says: I am the secretary of South Coast Steamship Company, the petitioner named in the foregoing petition. I have read the foregoing petition and the same is true to the best of my knowledge, information and belief. I make this affidavit for and on behalf of said petitioner and as an officer, to wit, the secretary thereof.

C. J. ROBERTS.

Subscribed and sworn to before me this 2nd day of March, 1918.

(Seal) FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and, in my opinion, the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this court.

OLIVER DIBBLE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

As we indicated on our petition, the Circuit Court of Appeals in deciding this cause announced the following propositions:

1st. That the law applicable to this case was not altered by the Act of June 23, 1910 (36 Stat. L. 604). (This conclusion accords with petitioner's position.)

2nd. That there is a divergence among the cases as to whether a charter-party which requires the charterer to furnish supplies to the ship, withdraws from the master the power to order supplies for which the material man, with knowledge of the terms of the charter-party, may assert a lien.

3rd. That the ship-owner's immunity from the necessity of paying the ship's bills does not relieve his ship from a like necessity.

4th. That the provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted for supplies furnished the ship, is tantamount to a declaration by the owner that such liens may be asserted.

We will consider these propositions in the order indicated.

I.

THE LAW APPLICABLE TO THIS CASE WAS NOT ALTERED BY THE ACT OF JUNE 23, 1910 (36 Stat. L. 604).

This proposition coincides with the conclusion for which petitioner has contended throughout this cause, and by the same token, it is in conflict with the position which libelant took. Libelant believed that his cause could not prevail if it were concluded that the Act of 1910 did not ordain a principle of law different from that which prevailed theretofor. In his brief in the Circuit Court of Appeals, libelant said:

> "There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it". (Appellee's brief, p. 2.)
>
> "The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens is immaterial under the Federal Act of said date". (Pages 7 and 8 of appellee's brief.)

Notwithstanding libelant's contention that the law was so altered by the Act of June 23, 1910, as to render immaterial, knowledge on the part of the supply-man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, the court held that the Act of 1910

> "was intended as declarative of maritime law respecting the subject, as it existed prior to

> the enactment. It was not designed to ordain any new or different principle of law". (Transcript of Record p. 167.)

In this respect the court's opinion coincides with the conclusion reached by the other courts of the country.

> *The Sinaloa,* 209 Fed. 287, 288;
> *The Dredge A,* 217 Fed. 617, 628-9;
> *The Yankee,* 233 Fed. 919, 925-6.

Any other conclusion would disregard these two principles:

> (a) "The presumption is that the legislature does not intend to change or modify the law beyond what it declares in express terms, or by unmistakable implication". *(The Dredge* A (supra).)
>
> (b) "It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be extended by construction, analogy or inference". *(The James T. Furber,* 157 Fed. 126, 129.)
>
> *Pratt v. Reed,* 19 How. 359, 361;
> *The Lottawanna,* 21 Wall. 558;
> *The Aurora,* 194 Fed. 559;
> *The Yankee Blade,* 19 How. 82;
> *The Dixie,* 236 Fed. 607, 608.

II.

The next proposition announced by the court is the following:

THERE IS A DIVERGENCE AMONG THE CASES AS TO WHETHER A CHARTER-PARTY WHICH REQUIRES THE CHARTERER TO FURNISH SUPPLIES TO THE SHIP, WITHDRAWS FROM THE MASTER THE POWER TO ORDER SUPPLIES FOR WHICH THE MATERIAL-MAN, WITH KNOWLEDGE OF THE TERMS OF THE CHARTER-PARTY, MAY ASSERT A LIEN.

We respectfully submit that the divergence arises from the decision in this case and that the court cites no authority to support its conclusion.

THERE ARE NUMBERLESS AUTHORITIES WHICH SUPPORT THE ANTITHESIS OF THE CONCLUSION WHICH WAS REACHED BY THE CIRCUIT COURT OF APPEALS.

Some of these authorities follow:

The Columbus, (1879) 5 Sawy. 487; Fed. Cas. 3044;

The William Cook, (1882) 12 Fed. 919;

The S. M. Whipple, (1881) 14 Fed. 354;

The Secret, (1879) 15 Fed. 480;

Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726;

The Cumberland, (1886) 30 Fed. 449, 455;

The Ellen Holgate, (1887) 30 Fed. 125;

The International, (1887) 30 Fed. 375;

The Samuel Marshall, (1892) 49 Fed. 754, 760;

The Samuel Marshall, (1893) 54 Fed. 396, 398-399, 404;

The Kate, (1896) 164 U. S. 458;
The Valencia, (1897) 165 U. S. 264, 272-3;
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The H. C. Grady, (1898) 87 Fed. 232;
The Robert Dollar, (1902) 115 Fed. 218, 219-220;
The North Pacific, (1900) 100 Fed. 490;
The George Farwell, (1900) 103 Fed. 852;
The Underwriter, (1902) 119 Fed. 713;
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The J. Doherty, (1913) 207 Fed. 997;
The Malloa, (1914) 214 Fed. 308;
The Francis J. O'Hara, Jr., (1915) 229 Fed. 312;
The Oceana, (1916) 233 Fed. 139;
The Yankee, (1916) 233 Fed. 919, 925-6;
The Oceana, (1917) 244 Fed 80.

In *The Columbus,* (1879) 5 Sawy. 487; Fed. Cas, 3044, Judge Hoffman said:

> "For these reasons I am of opinion that the lien conferred by the statute is essentially a maritime lien, that it is subject to the same rules and to be tested by the same principles as those which apply to liens for supplies furnished to a foreign vessel, and that it was not

> intended to confer upon a 'master, agent or consignee' an irrevocable power to hypothecate the vessel for supplies in the port where the owner resides, contrary to his instructions, and in spite of his protest, and that the material-man, who, with full notice of the circumstances, furnishes supplies to the master, must look to him personally, and not to the owner or the vessel for repayment".

In *The William Cook*, (1882) 12 Fed. 919, it was held:

> "The libelant is in this case precluded from alleging that the coal was furnished upon the credit of the vessel. The evidence is clear and convincing that he had express notice, from the owners, of the charter-party and of its terms, and that neither they nor the vessel should be held for supplies, and that thereupon the libelant arranged specifically with Pollock, the charterer, for weekly payments. Upon such facts he could not lawfully charge the ship, and the coal must be held to have been supplied upon Pollock's personal credit. Beinecke v. The Secret, 3 Fed. Rep. 665; The Norman, 6 Fed. Rep. 406. After such notice it would be a gross violation of justice and equity to permit a material-man to continue to furnish supplies and charge the ship therefor, which would be virtually at the expense of the owners, who had no interest in the supplies and had carefully used all possible means of avoiding liability. The Columbus, 5 Sawy. 487. There are doubtless circumstances in which the known obligation of the charterer to pay for supplies would not prevent a lien on the ship, as where a vessel is in a foreign port in distress, with no means of obtaining supplies necessary to complete her voyage and reach the hands of her owners, and where express notice not to credit the ship had not been given. In such cases the

> interests of her owners and the necessities of the case might raise an implied authority in the master from the owners to obtain necessary supplies on the credit of the ship, notwithstanding the charterer's known obligation to pay for them. The Monsoon, 1 Spr. 37; The City of New York, 3 Blatchf. 187, 188".

In *The S. M. Whipple,* (1881) 14 Fed. 354, it was held:

> "Where the owner, who charters a vessel to third parties and under the terms of the charter-party appoints the master for the term of the contract, seeks to displace the lien given by statute for materials and supplies furnished the vessel by setting up a private agreement by which the master was deprived of the authority to create liens on the vessel, he should show by clear proof that explicit and unequivocal notice of the facts was given to persons dealing with the vessel."

The Secret, (1879) 15 Fed. 480.

Blatchford, Circuit Judge, said:

> "Although The Secret was in a foreign port, and although Murray, Ferris & Co. when ordering the coal, stated to Russell & Hicks that it was for The Secret, yet the circumstances were such that the libelant's agents, Russell & Hicks, were put on inquiry, from which they could easily have learned this, notwithstanding the above facts. Murray, Ferris & Co. were the charterers of the vessel, and had no power to bind the claimant or the vessel to pay for coal bought for her. If they had used due diligence they would have ascertained such want of power."

Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726, where the court says:

"Again, the ship in this case was under no necessity of proceeding upon her new trips, for which this coal was furnished. Savage, by his charter, had no right to pursue her ordinary navigation at the ship's expense. If he could not fit her out for her trips without resorting to her own credit, having no right to use that credit for ordinary supplies, it was his duty to surrender her, or, at least, not to run her until he could arrange to do so without a violation of his agreement with the owner. There was no commercial necessity that she should depart upon this trip; and the general owner had no interest that she should be navigated except according to the terms of the charter. In this respect the case is wholly different from that of The City of New York, 3 Blatchf. 189, where the vessel was in a port of distress, on an unfinished voyage, and where the interest of the ship and of her general owner also required the supplies. Broadly considered, therefore, the first requisite for a lien, viz., a necessity for the supplies did not exist. Had Savage, being under no necessity to continue the vessel's trips, and not being in any port of distress, expressly contracted for ordinary supplies on the ship's credit, this would have been a clear wrong to the general owner, and a violation of the terms of the charter, because the stipulation of the charter was for the very purpose of preventing this. The language of the supreme court in the case of Gracie vs. Palmer, 8 Wheat. 605, 639, would in that case seem to be applicable. 'The charterer', the court says, 'has contracted with the shipper (here the material man) to do an act which he could not perform without violating his own contract with the ship's owner; and he must therefore be considered as having entered into a contract subordinate in its nature to that previously existing between the owner and charterer.' And this was approved in The Freeman vs.

> Buckingham, 18 How. 182. In the case last cited, Curtis, J., also expressly limits the effect of the ordinary maritime usages to 'contracts * * * entered into with a person who has no notice of any restriction.' Page 490. But, in the present case, Savage clearly had no intention of violating the charter, or of obtaining supplies on the ship's credit, and the question of his *power* does not, therefore, properly arise in this case. The notice, moreover, given by the captain to the libelants, was of itself one of the terms upon which the coal was supplied. The captain is the person who in a foreign port specially represents the ship and all interests combined. When he gives notice that the ship is not to be bound for supplies, that becomes one of the terms on which any supplies subsequently delivered must be deemed furnished, and which estop the material-man from asserting the contrary. Considering the knowledge of the charter that the libelants possessed, as well as this notice from the captain, and the fact that the supplies were for the ship's ordinary use, and not under the stress of any maritime necessity, or in a port of distress, the obligations of good faith, without the observance of which no lien is sustained, estop the libelants from asserting any credit to the ship, or holding her answerable." (Citing cases.)

The Cumberland, (1886) 30 Fed. 449, 455, where the court said:

> "The same conclusion would follow in the case of Philbrick, who furnished coal to the amount of $900 during November, December and January, upon the application of the masters, were it not for one circumstance. He says he had no knowledge of how the boat was being run; that the coal was furnished upon the credit of the boat, and he would not have furnished it upon the credit of the owners or

> McKay; but he admits that on the twentieth December he met a party who claimed to be her owner, and informed him of the charter and its terms. This I consider sufficient to put him upon his guard, and cause him to make inquiries as to the truth or falsity of the statement, and, if he did not, he cannot claim to have been acting in good faith, and without notice. Judgment will be allowed for the amount of coal furnished before the date when he received this information, and the rest disallowed."

The Ellen Holgate, (1887) 30 Fed. 125, where the court held:

> "Persons supplying provisions for the crew, and those advancing money to pay the claims of material-men, may look to the vessel for payment, if the transactions have taken place away from her home port, and at the request of her master, unless it can be shown that the master was without authority, and that the parties had knowledge of such want of authority."

The International, (1887) 30 Fed. 375, where the court said:

> "Had this been a question of materials or supplies furnished by a material-man having knowledge of the terms of the charter, no lien upon the vessel would have been sustained, unless the supplies were furnished in a port of distress, and were necessary to enable the vessel to reach her owners, i. e., unless the supplies were necessary to the ship and her owners, and not merely to the charterer's business." (Citing cases.)

In *The Samuel Marshall,* (1892) 49 Fed. 754, 760, the court in denying a lien for coal furnished on the order of the master, said:

> "But the merchant is presumed to know that it is a common thing for a vessel to be hired, and to be managed and used, in the employment of others, under charter-party with the owner or otherwise, under circumstances where the obligation for supplies does not rest upon the owner. And if the facts presented to him are sufficient to induce a reasonably prudent man, having a just regard to the rights and interests of others, to suppose it probable that the owner is not employing the vessel, but that it is in the service of another, under charter or other agreement involving the payment of charges and expenses by the charterer or lessee, he is bound in good faith to inquire. When the circumstances denote that the owner of the vessel is not the party for whose interest the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another, and assert a lien therefor, contrary to the stipulations and interests of the owner. * * * The merchant is under no obligation to furnish the supplies. He may do so, or not, and he may sell for cash or on credit, as he thinks advantageous to himself. If he does furnish and on credit, in the face of an agreement between others of which he has notice, devolving the obligation of payment upon another than the owner, and denying to the charterer the right to hypothecate the ship, he ought not to be allowed to assert a lien upon the owner's property."

The decision in this case was affirmed *(The Samuel Marshall,* (1893) 54 Fed. 396) and in writing the opinion of affirmance, Taft, Circuit Judge, said (pp. 398-399):

> "The questions in the case are two: First. Did the libelants obtain a lien for the coal furnished to the steamer Marshall under the general maritime law? Second. If they did not, then are they entitled to a lien under the state law of Michigan? Judge Severens, in the court below, held, in a satisfactory and convincing opinion, that they had no lien in either aspect of the case, and we entirely concur with him in that view."

Judge Taft also said (p. 404):

> "It is true that, under certain circumstances, the master of a vessel, under a charter, where the charterer is the owner pro hac vice, may hypothecate his vessel for supplies, contrary to the terms of the charter-party, but this is where there is dire necessity to save the vessel, or to bring her home within the reach of the owners. No such case is here presented. This was the home port of the charterers. The necessity was only that of going on the voyages for which the vessel was chartered, and not to bring the vessel home to its owners, or to save it from injury or loss."

The decision was followed in *The Kate*, (1893) 56 Fed. 614, and the latter was affirmed in

The Kate, (1896) 164 U. S. 458,

where the Supreme Court said:

> "If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the ves-

> sel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.
>
> * * * * * *
>
> "If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter-party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter-party but charged it only with knowledge of the facts that the vessel was being operated under a charter-party, a different question would be presented."

The opinion of Judge Severens in *The Samuel Marshall* (supra) was approved by the Supreme Court in

The Valencia, (1897) 165 U. S. 264, 272-3.

where it was said:

> "Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter-party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine. We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the possession and control of a vessel under such a

> charter-party cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

The opinions rendered in *The Samuel Marshall* (supra) were approved in *The Alvira,* (1894) 63 Fed. 144, 160, in which the court said:

> "Counsel for claimants rely greatly upon *The Samuel Marshall* case, 49 Fed. 754; Id. 4 C. C. A. 385, 54 Fed. 396. The opinions in that case contain a very satisfactory statement of the law of domestic liens, both in the decisions of the district Judge and of the appellate tribunal (Circuit Court of Appeals, Sixth Circuit); but upon a careful reading of the case I do not find anything inconsistent in the law, as there expounded, with that of the case at bar. The facts are of a different character, and this, of course, must be taken into consideration. In that case both the lower court and the appellate tribunal held that actual notice had been given to the supply man. In the case at bar no actual notice was given to the material men, nor am I able to find, from the evidence produced, that they were in possession of such facts as ought to have put them upon inquiry, or that their failure to be informed was due to carelessness or indifference. In the case of *The Samuel Marshall* the owner had no actual notice of the furnishing of the coal, and had, therefore, no opportunity of protecting himself by notifying the supply man. In the case at bar the owners were fully apprised of the fact that repairs were being made, and that materials were being furnished therefor. There, the coal for which a lien was claimed was something which the charterer was bound to furnish, and

> for which the owner received no direct benefit; here the owner derives some benefit in getting back an improved vessel. I do not allude to this last feature as constituting a distinguishing mark which would require the application of different principles of admiralty law, but simply to show that the facts of the Samuel Marshall case are not analogous, in their main features, to the case at bar."

In the course of his opinion in *The Alvira* (supra) Judge Morrow lays down the precise rule for which we contend in this case. He says:

> "Therefore, the general principle that the owner is deemed to consent to the accruing of liens where the entire possession, control, and management of a vessel is intrusted to another is qualified by this condition: If the supply or material man know of the charter or the relation in which the ostensible owner holds, or if he be advised of the real status of such relation by the general owner or by the charterer, or is placed in possession of such facts as would put, or ought to put, a reasonably prudent man on inquiry, the presumption arises that the supplies, materials, or repairs were furnished upon the credit of the charterer himself, and there is no lien. And the onus lies on the supply or material man to remove this presumption. The reason for this is plain. Courts of admiralty do not favor secret liens; otherwise, owners would often fall an easy prey to liens created by injudicious or unscrupulous charterers. Moreover, the supplies, materials, or repairs are generally furnished exclusively for the benefit of the charterer; at least it may be said that he is the party primarily benefited thereby, the owner, as a general rule, being only incidentally benefited, if at all." (Page 156.)

In *The Rosalie*, (1895) 75 Fed. 29, it was held:

> "Where materials were furnished for the use of a vessel, upon the order of a company which had possession of her under a contract of purchase, and which was, therefore, the owner pro hac vice, in the port where such company had its principal place of business, by material men who either knew the company's relation to the vessel, or were in possession of the avenues of information, and of facts sufficient to put them on inquiry, held, that credit must be considered to have been given to the company, and that, consequently, no lien was created. The Alvira, 63 Fed. 144, distinguished.
>
> The mere fact that persons furnishing materials in the home port, on the order of the owner pro hac vice, 'suppose' that the vessel is good for the purchase price, is not of itself sufficient to create a lien."

Another decision which, if followed, is absolutely determinative of the instant case, is *The H. C. Grady*, (1898) 87 Fed. 232, where Judge De Haven said:

> "The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.
>
> It is claimed by the intervener, Strong, that under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were

furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not in the State where she belongs, and where her owner resides.

* * * * * *

"There was nothing, in the facts or circumstances, under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * * *

"In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars'.

* * * * * *

"The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under a contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * * *

> "As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; and if after its execution their claim therefor must be held to be subordinate to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals in the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

Judge Hawley recognized the same doctrine when he said in *The Robert Dollar,* (1902) 115 Fed. 218, 219-220:

> "It is shown by the uncontradicted evidence in this case that, while the Robert Dollar was being operated as a carrier of freight and passengers between Seattle and Nome and other places in Alaska, it was necessary for her to replenish her supplies of coal and water at Dutch Harbor, both in going north and returning; that her master did not have money to pay her bills for these necessaries; and that upon his request the libelant furnished coal, water, and provisions to the steamer, which were necessary for her use and to feed her passengers and crew; that neither the owner nor charterer had any credit at Dutch Harbor; and said sup-

plies had to be obtained on the credit of the ship. These are the conditions under which, by the maritime law, a lien becomes attached to a ship, and the only semblance of a defense to this part of the case is made upon the ground that by the charter party it was agreed between the owner and the charterer that the latter should pay all the bills incurred in operating the vessel during the period for which she was hired, and should at the expiration of said period, return the vessel to her owner free from liens. It is not pretended that the libelant had actual knowledge of this stipulation in the charter party; but it is claimed that the fact that the vessel was chartered to the Alaska & Pacific Steamship Company had been announced in newspapers, and was generally known among merchants and shipping men, and that the captain had possession of a copy of the charter party; so that if the libelants had made inquiry they might have become informed with respect to its conditions. There are two reasons why this defense cannot prevail. In the first place, the indebtedness was incurred by the master of the ship, who was appointed by the owner, and whose authority was ample to abrogate the agreement whenever it became necessary to do so in order to enable the vessel to get on and complete her voyage. The second reason is that this defense is not available to the charterer. Liens for supplies upon chartered vessels, in favor of creditors to whom notice has been given that the owners have parted with their possession relying upon agreements that the charterers will keep them free from liens, are not permitted, because the pledging of the credit of a ship under such conditions would be fraudulent, and the courts have refused to recognize such fraudulent claims in cases in which the owners have appeared to defend against them. But when a charterer obtains supplies on the credit of

> a ship in violation of a promise made to the owner that he will not do so, he has no right to plead his own broken promise to defeat his creditors."

Judge Hawley allowed the lien, but the decision was reversed and the libel was dismissed (116 Fed. 601).

In *The George Farwell,* (1900) 103 Fed. 882, the Circuit Court of Appeals said:

> "The following propositions seem to be established by authority:
>
> "(1) The charterer of a vessel becomes the owner pro hac vice to such an extent that he may bind the ship for repairs and supplies, when there is nothing in the charter restricting him in that particular.
>
> "(2) 'Neither reason nor public policy forbids the owner and the charterer from making' an agreement that the charterer shall supply such things, and keep the ship free of liens therefor. *The Kate,* 164 U. S. 465, 17 Sup. Ct. 138, 41 L. Ed. 516.
>
> "(3) If the person furnishing the labor or supplies knows the terms of such a charter, he cannot have a maritime lien upon a foreign vessel when he furnishes such labor and supplies upon the order of the charterer or the charterer's servants, even though he charges them to the vessel. *The Kate,* supra.
>
> "(4) The same rule will apply even if the person so furnishing labor and supplies has no knowledge of the contents of the charter party, 'If the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.' *The*

> *Valencia v. Ziegler,* 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710."

In *The North Pacific,* (1900) 100 Fed. 490, the Circuit Court of Appeals held:

> "The terms of a time charter of a steamer contained provisions indicating that the venture was to some extent a joint one between the owner and charterers. The owner, who was a member of a firm of shipping agents, was to sell the tickets for passage on the contemplated voyages, and his firm were advertised as agents for the vessel. The office of the charterers was also with such firm, with nothing to indicate that the business was separate. *Held,* that one furnishing to the vessel necessary supplies for the voyage on the order of the master, without either actual or constructive notice of the charter, was entitled to a lien on the vessel therefor, although by the terms of the charter such expenses were to be paid by the charterer."

In *The Underwriter,* (1902) 119 Fed. 713 Judge Lowell reflects upon the facts of the case, the principles evolved from his profound exposition of the history of maritime liens for supplies and repairs and reaches a conclusion diametrically opposed to the conclusion of the Circuit Court of Appeals in the instant case. The conclusion reached by Judge Lowell is correctly stated in the syllabus, as follows:

> "A charter-party providing that the charterer shall provide and pay for all the coal used by the vessel, and that the master, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, is

> not merely a contract between the parties which binds the charterer to reimburse the owner for coal paid for by the latter, but is also a limitation on the authority of the master to bind the owner or the vessel for such supplies; and no lien upon the vessel exists in favor of libelant who supplied coal on the order of the master in a foreign port, but which was not a port of distress, and was merely across the river from the home port, where the owner resided, and no actual necessity was shown for pledging the credit of the vessel, and where libelant knew the vessel to be under charter, and was put upon inquiry as to the terms of the charter."

In *The Vigilant*, (1907) 151 Fed. 747, Judge Gray, speaking for the Circuit Court of Appeals for the Third Circuit, said (p. 751):

> "Notwithstanding the ability of the distinguished judge who delivered the opinion of the court in that case, we are unable to agree that statutory liens of the kind here in question are thus limited. Upon the facts as stated, the case was correctly decided, and the proposition contained in the language above quoted was not necessary to sustain the decision. The Samuel Marshall had been chartered from its owner, with the express stipulation that the charterer was to have full control, employing and discharging officers and men, and with the obligation of paying all running expenses, including the purchase of coal. Libelants furnished coal to the vessel thus chartered, with knowledge of the fact of the charter, and that the master, who ordered the coal, was directly in the employ of the charterer. They also knew that the charterers were under obligation to furnish the coal, and that they had no authority, by themselves or by their agent,

> to make the owner liable therefor. Under this state of facts, it was held that the supply men had notice that the company had chartered the vessel, and that the coal was furnished on the credit of the charterer, and not of the vessel, and that, therefore, no lien attached under the Michigan statute, giving a lien for all debts contracted for by the owner or master on account of supplies furnished. No debt can be incurred, or lien established on its account, under the maritime law or the statute of the state, except by the authority, express or implied, of the party to be charged. In this case, there was express knowledge by the libellant of the stipulation by the charterer, which rebutted any implication of the authority on the part of the master to charge the vessel. The fundamental principles of agency cannot be ignored in the creation of liens, either by the law maritime of the statutory law of the State. The case of The Kate, 164 U. S. 458, 465, 17 Sup. Ct. 135, 140, 41 L. Ed. 512, was decided upon the same grounds."

The last decision preceding the act of 1910, which we have been able to discover is that rendered by the Circuit Court of Appeals of the Seventh Circuit, October 5, 1909, in the case of *Northwestern Fuel Company v. Dunkley-Williams Co.*, 174 Fed. 121.

Every detail of fact in that case is so precisely the same as the details in the instant case, and the decision there is so perfectly contrary to the opinion here, that, we submit, the present decision should not stand without further consideration and without an express disapproval of the conclusion reached by the Seventh Circuit, should it be found that that decision is erroneous.

When one compares Northwestern Fuel Company case (supra), with the instant case, he finds every detail of fact identical. He finds the same provisions respecting the necessity that the charterer shall supply the ship; he even finds "the provision that the charterer will hold the owner harmless from all liens against the vessel," which the learned District Judge felt was so compelling in this case (see opinion pp. 169-170 of Transcript of Record). In the Northwestern Fuel Company case it was fuel that was furnished, coal to permit the vessel to "discharge its peculiar function" of carrying on maritime commerce. The fuel was sometimes received by the captain, himself, personally. "The engineer usually signed the receipt for coal, but sometimes such receipts were signed by the captain, the same being charged on the books of the libelant to the steamer, care of Chicago and Milwaukee line" (p. 124). The libelant testified that: "He gave credit to the vessel upon the supposition that he would have a lien upon her in any event" (p. 125). In neither case did the owner expressly declare to the charterer, in the charter-party: "Thou shalt not permit a lien to attach to this vessel!" Nor in either charter-party was there anything "that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon" (see opinion p. 169 of

Transcript of Record). Yet in the instant case, without even a reference to the decision of the Circuit Court of Appeals for the Seventh Circuit (the last decision of any court prior to the act of 1910), the lien is allowed.

In *Northwestern Fuel Company v. Dunkley-Williams Company* (supra), the Circuit Court of Appeals said:

> "The test of liability herein is conclusively stated by the Supreme Court in the case of The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, as follows, viz.:
>
> " 'One furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control or possession of a vessel under such a charter-party cannot acquire a maritime lien, if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.'
>
> "It appears that libelant delivered the coal under the impression that the vessel would be liable therefor in any case. This accounts for its lack of diligence in making investigation as to the facts. The credit was not given to protect the owner's interest in the steamer, but that of parties for the time being operating the boat. Therefore, the question for the court to pass upon is whether libelant had actual knowledge, or was chargeable with knowledge, of the charter-party between appellee and the Chicago Transportation Company. The term 'Chicago and Milwaukee Line' seems to have been merely descriptive of the class of traffic that Petoskey was engaged in, and did not constitute a name. This was of itself a circum-

stance calculated to raise inquiry. Any effort on the part of libelant to ascertain why the owner of the steamer should operate under such a phrase would have resulted in the discovery of the charter-party and its terms. Nothing short of fatuous confidence in the liability of the steamer for supplies under all conditions can explain the failure to make investigation. Moreover, appellee introduces evidence to the effect that notice of the charter-party was mailed to libelant. The latter denies receiving any such letter. While this may not be conclusive proof of notice, as against libelant it relieves appellee from all suspicion of negligence in the premises, if any would otherwise attach. That no evidence is adduced as to notice to other furnishers of supplies is not persuasive, since the item of coal would be the first to be looked after. We deem it clearly shown that whatever negligence there was in the premises was that of libelant.

"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1,000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1,000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of The Surprise, 129 Fed. 873, 64 C. C. A.

> 309, since here we find that libelant was put upon notice of the charter-party.
>
> "The finding of the district court is affirmed."

To this point our quotations have been taken from cases decided under the law prevailing prior to the enactment of the act of June 23, 1910. The subsequent quotations come from cases which arose under the act.

In *The City of Milford*, (1912) 199 Fed. 956, an agreed purchaser was in possession of the ship under a contract, and there was nothing therein which unalterably inhibited the purchaser from incurring expenditures on the credit of the ship that might become a lien thereon. In fact the contract required the purchaser to provide a bond to protect the owner against liens upon the ship. The supplies involved in the libel were furnished upon the order of the master. It would not be simple to conceive of a case more nearly parallel with the instant case. Yet the decision was based entirely upon the question of notice. The court, in its opinion, subjects the testimony to a close analysis, and concludes therefrom that the material-men had no notice that the person in possession held the ship under a contract requiring it to pay for the supplies; and, consequently, allowed the lien. The court said:

> "There is nothing in the evidence to suggest that any of the libelants had notice that the company was not the sole owner of the ship. A number of them proved that, before extend-

ing credit, they were told that the company owned the ship. * * *

"The claimant's engineer in person gave the orders for some of the supplies, repairs or services He approved the bills for others. * * * the claimant, * * * says that had the libelants exercised the reasonable diligence required by the statute, they would have made further inquiry before extending credit.

* * * * * *

"Did the act require them to do all this? Its purpose was to simplify the law. There was need for it. The battle as to the liability of the ship for materials and services furnished it has been going on for centuries. Judge Lowell, in that wonderfully learned and exhaustive opinion of his in The Underwriter, (D. C.) 119 Fed. 713, tells a story of the long struggle. He shows how the questions of substantive law and of policy involved had in the course of hundreds of years become confused and complicated, by being mixed up with differences as to rules of procedure and with disputes as to jurisdiction between the courts of admiralty and those of common law. Rights of materialmen might depend upon whether, when they furnished supplies the ship was in a foreign or in a domestic port. * * * The distinction between foreign and domestic ports had come to be without substantial reason. Congress, in the act referred to, has abolished it.

* * * * * *

"The general purpose of this enactment is plain. Hereafter, when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person entrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say: 'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them: but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth; but I did not do so.'

"He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, or agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries, was without authority to bind the vessel therefor.

"Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general pur-

> pose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit." (Citing cases.)

The *Thomas W. Rodgers,* (1912) 197 Fed. 772, and *The Ha Ha*, (1912) 195 Fed. 1013, are each of the same assistance in the present problem as is *The City of Milford* (supra).

The J. Doherty, (1913) 207 Fed. 997, cannot, we submit, be distinguished from this case. There the person ordering the towage was authorized under the Act of 1910 to bind the vessel, because he was the managing owner of the charterer. Yet the court held there was no lien. The court said (page 1001):

> "In the light of these principles the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. Monk v. Cornell Steamboat Co., 198 Fed. 472; 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as

> effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter-party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally he must be held to know, as a matter of course, that the usual obligations exist. The Surprise, 129 Fed. 873; 64 C. C. A. 309. It is quite possible that the libelant believe that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel. The Samuel Marshall, 54 Fed. 398; 4 C. C. A. 385. Nor was its method of charging the items. McCaldin vs. The Stroma, 53 Fed. 281; 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk, Oliver, as to the usual practice of collecting from charterers are sufficient to prevent a recovery from the libelant." (Citing cases.)

In *The Malloa*, (1014) 214 Fed. 308, the person in charge was not inhibited from incurring any expense on the credit of the vessel which might become a lien thereon, and yet Judge Cushman proceeded to consider the question of notice and decided (we quote from syllabus):

> "Facts considered, and held not such as to put one making repairs on a vessel on inquiry as to the authority of the person contracting for the repairs, who was an agreed purchaser of a part interest, and in possession, to bind the vessel therefor under the provisions of Act June 23, 1910."

In *The Francis J. O'Hara, Jr.*, (1915) 229 Fed. 312, the court said:

> "It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (Section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. Rich v. Jordan, 164 Mass. 127; 41 N. E. 56.
>
> "The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence', have ascertained the master's lack of authority The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years

> previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.
>
> "The case is not like The City of Milford (D. C.) 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of the vessel) and the other agents of the company lead them (the lienors) to believe that it was the owner of the ship have testified truthfully and accurately.' Rose, District Judge, The City of Milford, (D. C. ubi supra) 199 Fed. at 958.
>
> "Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.
>
> "It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. The Eureka, (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

In *The Oceana*, (1916) 233 Fed. 139 (affirmed by the Circuit Court of Appeals for the Second Circuit in 244 Fed. 80), the provisions respecting payment for repairs, keeping the vessel free from liens and holding the owner harmless from all liens asserted against the vessel, are substantially the same as the corresponding provisions of the charter party in the instant case.

> "Until the ship should be fully paid for the purchaser covenanted, among other things:
>
> "(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills, for supplies and repairs to said ship and exhibit at reasonable times the ship's accounts, and bills to seller's representatives.
>
> "(b) To keep said ship and equipment in good repair."

Nevertheless the court in confirming the report of James K. Symmers, Esq., the special commissioner, recognized that the fact that the vessel was chartered had been brought to the attention of at least one of the materialmen (Kniffen & Demarest Company), and that no lien could be asserted by it.

In *The Yankee*, (1916) 233 Fed. 919, the court allowed the libel because the supply-man had no knowledge that the vessel was under charter. The court said (pp. 925-6):

> "But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the pre-

> sumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor'. This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remeies or the presumptions of the law."

In the course of its opinion in the instant case, the Circuit Court of Appeals says (see opinion, p. 163 of Transcript of Record):

> "There is a divergence of opinion among the cases as to whether a charter party of the nature and character of the one here involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc. Judge Lowell has held, in a most learned and searching opinion, that it does.

> *The Underwriter* (supra). But this decision is disapproved by the Circuit Court of Appeals of his Circuit in the case of *The Surprise,* 129 Fed. 873, which impresses us as being based upon the stronger reasoning."

We respectfully submit that the court was in error in concluding that the opinion of Judge Lowell in *The Underwriter* was disapproved in *The Surprise. The Underwriter* is neither mentioned nor referred to in *The Surprise.* The significance of that omission becomes compelling when one realizes that both cases arose in the same circuit; that the opinion in *The Underwriter* is now and was then, recognized generally by courts and commentators as one of the most scholarly expositions available, of a proposition of maritime law; and that the two cases were decided within a period of two years.

The decision in *The Surprise* was concerned with a different question from that concerned in *The Underwriter.*

Judge Putnam, in his opinion, limits *The Surprise* to a case concerning "hand to mouth necessities." He says in his opinion:

> "We wish, also, before taking up the detailed facts on this appeal, to lay aside another element. What were furnished by these libelants were *hand to mouth necessities.*" (34 C. C. A. at page 313.)

Judge Lowell in *The Underwriter* recognized that under some circumstances a lien would be allowed. Judge Lowell says (page 764):

> "Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, when it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists."

The Surprise is based upon facts vitally different from those concerned in this case. *The Underwriter* is based upon facts identical with those concerned in this case.

In *The Surprise* the supplies were "hand to mouth necessities" (supra), and Judge Putnam's opinion is based upon that circumstance. This fact is recognized by libelant's counsel; it is emphasized by the court which rendered the decision and it is so declared by commentators.

Counsel for libelant in referring to *The Surprise* says:

> "The court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessities, and so they were in the case at bar. We prefer, however, not to put the case on that basis, but to regard it from a strictly logical standpoint, as did the judge of the lower court."

Indeed, libelant readily recognized that he could not put his case on the basis that the supplies were "hand to mouth necessities", notwithstanding that some of them WERE LIQUORS AND CIGARS. (See bills of account, pp. 147 and 155 of Transcript of Record.)

Judge Putnam was very careful to limit the effect of his opinion in *The Surprise* to the case of "hand to mouth necessities". In the course of his opinion, he says:

> "We have no occasion to comment upon, or lay down any rules with reference to circumstances involving unusual expenses, and with regard to which there would be *ample opportunity to consult the owners* in the usual manner. What, in such event, would be required, in view especially of the fact that The Surprise was *a chartered vessel,* is not now relevant. (p. 314.)
>
> We have an ordinary case of minor supplies furnished to a vessel in a foreign port of the class of which she had immediate need, and a large part of which she could not take up conveniently, except at the place where needed; a case with circumstances under which, prior to The Kate and The Valencia, no admiralty court ever refused a lien, unless the owner showed that there was no necessity for credit to the vessel, and that the *merchant* knew that fact, or had very good reason to know it, *or was in some way clearly put on inquiry.* (p. 315.) * * * The conditions with regard to the supplies of the classes furnished by Robinson, when obtained by the authority of the master, express or implied, under the circumstances of this case, are commonly so pressing that they overcome the merely ordinary stipulations on the part of the charterer that he will not burden the vessel with liens." (p. 316.)

A few weeks after rendering his opinion in *The Surprise,* Judge Putnam wrote the opinion in *The New Brunswick,* 129 Fed. 893, and there he said:

> "The petitioner undertakes to bring this appeal within The Surprise (decided by us on March 29, 1904), 129 Fed. 873, and The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, *hand to mouth supplies were furnished* at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered."

In *The Philadelphia*, (1896) 75 Fed. 684, 685, (the basis of the decision in *The Surprise*) Putnam, Circuit Judge, said:

> "The learned Judge of the District Court found that the supplies, in all of the suits, were furnished on the credit of the respective vessels, and that the libelants had no notice that the vessels were under charter in which it was agreed that the supplies should be furnished at the expense of the charterers. * * *
>
> "The supplies were the reasonable hand to hand quantities of coal and water needed for their use in short coastwise trips."

Another circumstance which, we submit, demonstrates that *The Surprise* does not govern, or even apply to the instant case, is found in the language of the judge who wrote the opinion. It will be remembered that *The Surprise* is based upon the decision of the same court in *The Philadelphia* (supra), and it was of this case that Judge Putnam, who wrote the opinion in *The Surprise*, himself, said (*The Iris*, 100 Fed. 104, 107):

> "In the Philadelphia * * *, where it was maintained that the facts were similar to those

> in The Kate and The Valencia, the question which arose in those cases was laid aside, because the court found that the supplies were furnished under such circumstances that they were to be held as furnished in a foreign port on the orders of the master, thus bringing the circumstances within * * * the supposed hypothetical case stated in The Kate at pages 470 and 471; 164 U. S."

The hypothetical case to which Judge Putnam refers is stated by the Supreme Court (164 U. S. 470, 471) as follows:

> "If the libelant in this case had furnished the coal upon the order of the master, *and without knowledge or notice that the vessel was operated under a charter-party*, or if the coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, *under circumstances which did not charge libelant with knowledge of the terms of the charter-party*, but charged it only with knowledge of the fact that the vessel was being operated under a charter-party, *a different question would be presented.*"

So Judge Putnam practically says that *The Philadelphia*, the basis of *The Surprise*, was decided upon the theory that the furnisher either was ignorant of the charter-party or was ignorant of its terms. Surely a theory which cannot prevail in this case, wherein it is specifically found that the furnisher was notified that the South Coast was under charter and that the charterer was required to pay all bills!

In addition to the evidence which Judge Putnam, himself, furnishes of the fact that his decision in

The Surprise is limited to the case of "hand to mouth necessities", and in addition to the admission in this regard, of libelant's counsel, we have the criticism of Mr. Fitz-Henry Smith, Jr., in 21 Harvard Law Review 345, where, in referring to *The Surprise*, the commentator says:

> "The opinion lays great emphasis upon the character of the necessaries furnished the vessel."

III.

The third proposition announced by the Circuit Court of Appeals is the following:

A SHIPOWNER'S IMMUNITY FROM THE NECESSITY OF PAYING THE SHIP'S BILLS DOES NOT RELIEVE HIS SHIP FROM A LIKE NECESSITY.

We respectfully submit that the application of such a principle is very striking. If an owner need not pay money, but his property will be sold under a lien if he does not pay it, assuredly he is without much comfort! If a person's property may be sold for a debt which he need not pay, assuredly he will conclude that it is only sophistry to say that he need not pay it!

The very point has been considered.

In *The Sarah Cullen*, 45 Fed. 511, the court said:

> "the libelant was informed that the Ridgewood Ice Company was to pay the towage which was equivalent to notice that the vessel was not to pay it".

In *The Iris*, 100 Fed. 104, 109 (the Circuit Court of Appeals for the First Circuit) said:

> "The charterer of a vessel, who has no interest in her hull except for a temporary use under the charter, cannot be said to be procuring supplies at his own charge if he procures them under such circumstances as would impose a lien on what is the property of the person who lets the vessel."

Surely it cannot be said that any principle of law justifies the conclusion that a man's property is not immune from lien for a debt which the man himself is not required to pay!

IV.

The final proposition which the Circuit Court of Appeals announced is the following:

THE PROVISION OF THE CHARTER-PARTY REQUIRING THE CHARTERER TO HOLD THE OWNER HARMLESS FROM ANY LIEN ASSERTED FOR SUPPLIES FURNISHED THE SHIP, IS TANTAMOUNT TO A DECLARATION BY THE OWNER THAT SUCH LIENS MAY BE ASSERTED.

THIS CONCLUSION IS IN PERFECT CONFLICT WITH THE CONCLUSION REACHED BY THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND SEVENTH CIRCUITS RESPECTIVELY.

The identical proposition was presented to and repudiated by Circuit Judges Coxe, Ward and Rodgers in *The Oceana,* (1917) 244 Fed. 80, 81; and Circuit Judges Grosscup, Baker and Kohlsaat in *Northwestern Fuel Company v. Dunkley-Williams Co.,* (1909) 174 Fed. 121.

Not only was the identical proposition so presented and repudiated, but the proposition was predicated, as in this case, upon the provision of a charter-party which, as has been pointed out, is in universal use throughout the seaboard of the United States.

We respectfully submit that the present day expansion of American shipping is such that a conflict on so important and prevalent a provision should be definitely resolved.

We cannot better indicate the striking conflict than by setting forth, *pari passu,* the conclusions of the several courts:

Instant case, Circuit Court of Appeals for the Ninth Circuit:	*The Oceana* (supra), Circuit Court of Appeals for the Second Circuit:	*Northwestern* etc. *Co. v. Dunkley-Williams Co.* (supra), Circuit Court of Appeals for the Seventh Circuit:
"The terms of the present charter-party as respects the furnishing of repairs, supplies, etc. are only those usual to most charter parties, and *by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel.*" (See opinion, pp. 169-170 of Transcript of Record.)	"The agreement of sale contained, among others, the following covenant by the vendee: * * * 'To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by the purchaser.' *The libelants contend that this provision as to bonding is an authority to the vendee to create liens; but we regard it, on the contrary, as a prohibition added out of abundant caution.*" (244 Fed. 80, 81).	"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1000 we deem *without merit.* Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. *It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility.*" (174 Fed. 121, 124.)

See, also,

The City of Milford, 199 Fed. 956;
The Gen. J. A. Dumont, 158 Fed. 312;
The Golden Rod, 151 Fed. 6;
Quarles, (District Judge), in *Northwestern v. Dunkley*, 174 Fed. 124, 126-7.

Dated, San Francisco,
March 2, 1918.

Respectfully submitted,

MARCEL E. CERF C. H. SOOY,
Proctors for Petitioner.

OLIVER DIBBLE,
Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1917

No.

SOUTH COAST STEAMSHIP COMPANY
(a corporation),
Petitioner,
vs.
J. C. RUDBACH,
Respondent.
(Libelant below.)

NOTICE OF PETITION FOR WRIT OF CERTIORARI.

To Ira S. Lillick, Esq., Proctor for Libelant:

PLEASE TAKE NOTICE that the annexed petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, will be presented to the Supreme Court of the United States at the opening of Court on the 1st day of April, 1918.

Dated, San Francisco, California,
March 2, 1918.

MARCEL E. CERF C. H. SOOY,
Proctors for Petitioner.

OLIVER DIBBLE,
Counsel.

ADMISSION OF SERVICE.

Received copy

~~Due service~~ of the foregoing verified petition, brief and notice, by receipt of copies thereof, respectively, is hereby admitted this 2nd day of March, 1918.

IRA S. LILLICK,
Proctor for Respondent.

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In the Supreme Court
OF THE
United States

October Term, 1919

No.

South Coast Steamship Company (a corporation), claimant of the steamer "South Coast", etc., *Appellant,*	
vs.	
J. C. Rudbach, *Appellee.*	

BRIEF FOR APPELLANT.

Preface.

The precise point involved in this controversy was decided by Judge Lowell in one of the most scholarly opinions available on a maritime question (*The Underwriter,* 119 Fed. 713, 759-764). Consequently, unless the law applicable to the facts of this case was altered by the Act of June 23, 1910, we respectfully submit that the decision should have been reversed. That the law was not so altered appears conclusively from *The Francis J. O'Hara, Jr.,* 229 Fed. 312, and it was so held by the Circuit Court of Appeals in this case.

Statement.

We cannot better present a concrete abstract or statement of this case than to quote the opening portion of the opinion of the learned District Judge who tried the cause. Judge Dooling said:

> "Libelant furnished supplies at various times to the steamer 'South Coast' in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy one of the owners not to deliver any goods on the credit of the ship. So that if

the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.

"The charter in question contains the following provisions:

'Fifth:—It is understood that this charter is a charter of the bare vessel, and that the party of the second part (Levick) shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, over time of crew; agencies, commissions, consular charges, dry docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter'.

'Tenth:—Said party of the second part further covenants * * * that if said payments (charter hire) be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the second (first) part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services

> that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith' ". (Transcript of Record, pp. 121 to 123.)

Specifications of Error.

The Circuit Court of Appeals in affirming the District Court's decree for the libelant, held:

1st. That there is a divergence among the cases as to whether a charter-party which requires the charterer to furnish supplies to the ship, withdraws from the master the power to order supplies for which the material-man, with knowledge of the terms of the charter-party, may assert a lien.

2nd. That the ship-owner's immunity from the necessity of paying the ship's bills does not relieve his ship from a like necessity.

3rd. That the provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted for supplies furnished the ship, is tantamount to a declaration by the owner that such liens may be asserted.

4th. That the law applicable to this case was not altered by the Act of June 23, 1910 (36 Stat. L. 604). (This conclusion accords with petitioner's position.)

The conclusions reached by Judge Lowell in *The Underwriter* (referred to in our "preface") are quite the reverse of those of the trial court and Circuit Court of Appeals in this case. Following a profound exposition of the history of maritime liens for supplies and repairs, Judge Lowell reflects upon the facts of his case, the principles evolved from his treatise and states his conclusions as follows (119 Fed. 759-764. The italics are our own):—

> "It remains to consider the case at bar in the light of the results already reached. Did this owner assent to the lien in the case? Did he lead the materialman to believe in his assent? Ought the materialman to have known that the owner dissented? All the circumstances by which the lien is ordinarily created or from which it is ordinarily presumed are here present,—the foreign port, the order of the master, the absence of the owner, the need of supplies if the vessel is to navigate, the necessity of pledging the credit of the vessel if the supplies are to be procured. To this the defense is: Want of authority in the master, known to the materialman, to create the lien upon the vessel. What is meant by the master's want of authority in a matter like this? No law ever provided baldly that the repairer of a vessel should always have a lien. My vessel lies at a wharf out of repair, and she is repaired by a mere trespasser. In general he has no lien under any system of law. The repairs must be ordered or authorized by some one in authority, and the master is ordinarily such a person either at home or abroad; that is to say, the master ordinarily has authority to license the act of repairing. If authorized by him it is no longer a trespass. If the owner has given the master express authority to con-

tract for repairs or supplies, the owner is bound personally. If the repairs are within the scope of the authority which the maritime law attributes to the master, and that authority has not been specially limited, the owner or the charterer, that person of whom the master is agent, is personally bound to pay for the repairs. All this is a development of the ordinary law of agency. By English law it seems that the owner is bound, even if the advances for repairs, etc., are made in a domestic port. Abb. Shipp. (7th Am. Ed.), 186; Arthur v. Barton, 5 Mees. & W. 138; Johns v. Simons, 2 Q. B. 425; The Lochiel, 2 W. Rob. Adm. 45. See Speerman v. Degrave, 2 Vern. 643. The owner is bound by the act of his authorized agent, as if he had ordered the repairs himself. If the owner is actually present in the port, something more than the ordinary implied authority of the master may be necessary to bind the owner for repairs, even if not for supplies. By a peculiarity of the maritime law the master also is bound individually, but this peculiarity need not concern us here. *Whatever be the authority ordinarily given to a master, if in the particular case he has no authority to bind his principal, and if the materialman knows this want of authority, the owner or principal cannot be held.* This also is the familiar law of agency. So, if the master has no authority to permit the materialman to make the repairs, and the materialman, who makes them on the master's order, knows this want of authority, it is hard to see how he can justify his trespass. If he knows that the master is forbidden to create a debt binding upon the owner, he cannot hold the owner. If he knows that the master is forbidden to permit the creation of a lien on the ship, he cannot claim a lien. Put the case in another way: If the materialman knows that the master is forbidden to repair, even in a foreign port, it would seem that he cannot proceed against either owner or vessel. If he knows that the master is permitted to repair, but only upon the condition that the repairs are chargeable neither to the owner nor to the vessel, then, if he makes the repairs on the order of the master, and without objection, it would seem that he impliedly waives his lien upon the vessel. See Emerigon, in Hall's Maritime Loans, 89, 90. It is true that the maritime law and its codes give great power to the master. But these powers must be subject to enlargement and diminution by agreement between owner and master. In general, the latter cannot hold the former by the general rules of maritime law against an express agreement duly entered into between them, and it is hard to see how he can bind him in contravention of the agreement to a third person who has knowledge of its terms. We need not here discuss the statutory lien. The terms of the statute may expressly give to the master authority to create a lien, whether the owner authorizes it or not. See The Kate, 164 U. S. 458, 470; The S. M. Whipple (D. C.) 14 Fed. 354.

The mere fact that a vessel is known to be under charter does not deprive of his lien one who, in a foreign port, furnishes it with supplies on the order of the master. The George Dumois, 15 C. C. A. 675, 68 Fed. 926; The Philadelphia, 21 C. C. A. 501, 75 Fed. 684. *But if a charter or other contract limits the authority of the master in the matter of buying coal, and forbids him to buy it except upon the personal credit of the charterers only (and perhaps on his own personal credit) and if the libelant has notice of this limitation, it would seem that the lien either does not arise or is impliedly waived.* In The Kate, 164 U. S. 458, Mr. Justice Harlan said: (Here follows a quotation from the cited case).

The learned Justice also quoted from an opinion rendered by Judge Sprague in this court in The Sarah Starr, 1 Spr. 453, 455, Fed. Cas. No. 12,354, where it was said: (Here follows quotation subsequently appearing in our brief).

See The Columbus, 5 Sawy. 487, Fed. Cas. No. 3,044; Swift v. The Albus, Fed. Cas. No. 13,694; The S. M. Whipple (D. C.) 14 Fed. 354; The Alvira (D. C.) 63 Fed. 144.

In the Bombay (C. C.) 38 Fed. 863; Id. (D. C.) 38 Fed. 512 it is not stated if the libelants knew that the vessel was under charter, and it is said expressly that they had no notice of its provisions. By the French law it seems that the vessel is not bound for supplies ordered by the charterer unless the supplies are needed for the ship, apart from the special needs of the charterer, and unless the owner, if present, would have ordered them. Desj. I, 256.

One argument in support of the Master's authority to bind the vessel, even when expressly forbidden to do so, should not be overlooked. Suppose the charter provides that the owner shall pay the wages of the crew. To put this charge upon the charterer is not uncommon. Suppose the crew to have knowledge that the charter forbids the charterer to create a lien for wages, it may be asked if the crew would lose their lien. In the case put they would have that knowledge of the master's limitation of authority which the materialmen are held to have had in the case at bar. Why should they fare any better? It is probable that the seamen's lien on the vessel would exist even in the case put,—that is to say, even though they knew that the master, in permitting it to arise, was guilty of bad faith. The seamen would be protected, however, not by the logical result of admitted principles of general law, but by reason of the favor shown to them in a court of admiralty. The wages of seamen are secured upon the vessel in many jurisdictions by a statute which admits of no exception. *Taking it as established, then, that the vessel is not bound even for necessary supplies furnished in a foreign port on the master's order, provided the materialman knows that the master is forbidden to create a lien for the purpose,* we next consider if the master's authority was so limited in this case. The limitation here contended for by the claimant is found in the charter party, whose material parts are as follows:

(2) The owner shall provide and pay for all the provisions, water, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew of said tug; shall pay for the insurance of the same; also for all ship, cabin, engineroom, and deck stores; and maintain said tugs in a thoroughly efficient state in hull and machinery for and during the service, and including the necessary hawsers and lines for mooring and towing.

(3) The charterer shall provide and pay for all the coals, port charges, pilotages, agencies, and commissions, and all other charges whatsoever, except those before stated, and shall likewise, in case the owner deems it necessary to insure said tugs, or any of them, against war risks, pay the additional cost of the premium for such insurance.

The charterer shall accept and pay for all coals in the tugs' bunkers on delivery, and the owner shall, on the expiration of this charter party, pay for all coal left in the bunkers, each at the current market prices at the port of Boston when said tugs are delivered to them.

(6) The captains of said tugs, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, and the charterer hereby agrees to indemnify the owner from all consequences or liabilities that

may arise from any irregularities in ship's papers, of from the captains signing bills of lading, or otherwise complying with the charterer's directions.

The court has to consider if this language is (1) a limitation on the authority of the captain, or (2) merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter. The language of the clauses might not unreasonably bear either construction. On general principles there is much to be said in support of the contention that a clause in a charter like that above quoted, providing that the charterer shall supply the vessel with coal, is intended merely as a contract between charterer and owner, and does not limit the general authority of the master to order coal for the vessel upon the vessel's credit in a foreign port. In The Kate, above cited, the provisions of the charter were much like those in this case, and the supreme court said at page 465, 164 U. S. page 138, 17 Sup. Ct. and page 512, 41 L. Ed. (Here follows quotation subsequently appearing in our brief).

There was a like charter in The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, and the court said at page 270, 165 U. S. page 325, 17 Sup. Ct., and page 710, 41 L. Ed.:

'Although the libelants were not aware of the existence of the charter party under which the Valencia was employed, it must be assumed, upon the facts certified, that by reasonable diligence they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libelants knew that the steamship company had an office in the city of New

York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters, or in reference to the solvency or credit of that company.'

See Beinecke v. The Secret (D. C.) 3 Fed. 665, quoted with approval by the supreme court in the last named case; The Cumberland (D. C.) 30 Fed. 449, 455; The William Cook (D. C.) 12 Fed. 919; Neill v. The Francis (D. C.) 21 Fed. 921; The Solveig, 43 C. C. A. 250, 103 Fed. 322; The Stroma (D. C.) 41 Fed. 599; The Priate (D. C.) 32 Fed. 486.

In other cases it was assumed that, if the materialman had had knowledge of the existence of a charter like that in this case, he would have had no lien, although as no knowledge on his part was established, the lien was allowed. The North Pacific, 40 C. C. A. 510, 100 Fed. 490; Norwegian S. S. Co. v. Washington, 6 C. C. A. 313, 57 Fed. 224; The Ellen Holgate (D. C.) 30 Fed. 125. These cases construe the language used in this charter to forbid the master to pledge the credit of the vessel for the supplies he orders. Many of these cases, and others heretofore cited, also hold that the materialman is affected by the limitations of the charter if he has notice of them. There is much authority for the proposition that this charter, if brought to the notice of the materialman, will prevent him from getting a lien. It is true that there is authority upon the other side, and that the opinions of the supreme court just cited are not quite explicit. In the City of New York, Fed. Cas. No. 2.758, the lien was upheld in the case of a charter like this. The vessel was in a really distant port, however, and was in such peril that the limitation imposed on the master's authority by the charter may have been treated as inapplicable within the intent of the parties. The opinion is short. See The Wm. Cook (D. C.) 12 Fed. 919, 920. In The Lucia B. Ives, Fed. Cas. No. 8,590, the lien was upheld, but whether in reliance on the express terms of the statute or upon a doubt as to the meaning of the charter is not clear. In The Monsoon, Fed. Cas. No. 9,716, decided by Judge Sprague, in which that distinguished Judge upheld a lien upon a chartered vessel, it is doubtful if the decision was rested upon a supposed inability of the owner to limit the master's authority, or upon a construction of the charter in question. If the former, the case stands substantially alone; if the latter, it is opposed to the great weight of authority. See The H. B. Foster, 3 Ware, 165, Fed. Cas. No. 6,291; Rozo v. The Neversink, Fed. Cas. No. 12,079; The India (D. C.) 14 Fed. 476; Id. (C. C.) 16 Fed. 262. The language of some of the opinions last cited is not clear, but the learned Judges who delivered them did not mean to hold that a materialman could claim a lien for supplies furnished a vessel where he knew that the person ordering the supplies was expressly forbidden to permit the vessel to become bound for them.

That a chartered vessel is ordinarily bound for the price of supplies ordered for her use in a foreign port by the master was expressly decided in this circuit in the case of The Philadelphia, and this is the law where the charter is silent upon the subject. *Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, where it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists.*"

I.

The first proposition announced by the court is the following:

THERE IS A DIVERGENCE AMONG THE CASES AS TO WHETHER A CHARTER-PARTY WHICH REQUIRES THE CHARTERER TO FURNISH SUPPLIES TO THE SHIP, WITHDRAWS FROM THE MASTER THE POWER TO ORDER SUPPLIES FOR WHICH THE MATERIAL-MAN, WITH KNOWLEDGE OF THE TERMS OF THE CHARTER-PARTY, MAY ASSERT A LIEN.

We respectfully submit that the divergence arises from the decision in this case and that the court cites no authority to support its conclusion.

THERE ARE NUMBERLESS AUTHORITIES WHICH SUPPORT THE ANTITHESIS OF THE CONCLUSION WHICH WAS REACHED BY THE CIRCUIT COURT OF APPEALS.

Some of these authorities follow:

The Columbus, (1879) 5 Sawy. 487; Fed. Cas. 3044;

The William Cook, (1882) 12 Fed. 919;

The S. M. Whipple, (1881) 14 Fed. 354;

The Secret, (1879) 15 Fed. 480;

Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726;

The Cumberland (1886) 30 Fed. 449, 455;

The Ellen Holgate, (1887) 30 Fed. 125;

The International, (1887) 30 Fed. 375;

The Samuel Marshall, (1892) 49 Fed. 754, 760;

The Samuel Marshall, (1893) 54 Fed. 396, 398-399, 404;

The Kate, (1896) 164 U. S. 458;
The Valencia, (1897) 165 U. S. 264, 272-3;
The Alvira, (1894) 63 Fed. 144, 156, 160;
The Rosalie, (1895) 75 Fed. 29;
The H. C. Grady, (1898) 87 Fed. 232;
The Robert Dollar, (1902) 115 Fed. 218, 219-220;
The North Pacific, (1900) 100 Fed. 490,
The George Farwell, (1900) 103 Fed. 852;
The Underwriter, (1902) 119 Fed. 713;
The Vigilant, (1907) 151 Fed. 747, 751;
Northwestern Fuel Co. v. Dunkley-Williams Co., (1909) 174 Fed. 121;
The City of Milford, (1912) 199 Fed. 956;
The Thomas W. Rodgers, (1912) 197 Fed. 772;
The Ha Ha, (1912) 195 Fed. 1013;
The J. Doherty, (1913) 207 Fed. 997;
The Malloa, (1914) 214 Fed. 308;
The Francis J. O'Hara, Jr., (1915) 229 Fed. 312;
The Oceana, (1916) 233 Fed. 139;
The Yankee, (1916) 233 Fed. 919, 925-6;
The Oceana, (1917) 244 Fed. 80.

In *The Columbus*, (1879) 5 Sawy. 487; Fed. Cas. 3044, Judge Hoffman said:

> "For these reasons I am of opinion that the lien conferred by the statute is essentially a maritime lien, that it is subject to the same rules and to be tested by the same principles as those which apply to liens for supplies furnished to a foreign vessel, and that it was not

> intended to confer upon a 'master, agent or consignee' an irrevocable power to hypothecate the vessel for supplies in the port where the owner resides, contrary to his instructions, and in spite of his protest, and that the material-man, who, with full notice of the circumstances, furnishes supplies to the master, must look to him personally, and not to the owner or the vessel for repayment".

In *The William Cook,* (1882) 12 Fed. 919, it was held:

> "The libelant is in this case precluded from alleging that the coal was furnished upon the credit of the vessel. The evidence is clear and convincing that he had express notice, from the owners, of the charter-party and of its terms, and that neither they nor the vessel should be held for supplies, and that thereupon the libelant arranged specifically with Pollock, the charterer, for weekly payments. Upon such facts he could not lawfully charge the ship, and the coal must be held to have been supplied upon Pollock's personal credit. Beinecke v. The Secret, 3 Fed. Rep. 665; The Norman, 6 Fed. Rep. 406. After such notice it would be a gross violation of justice and equity to permit a material-man to continue to furnish supplies and charge the ship therefor, which would be virtually at the expense of the owners, who had no interest in the supplies and had carefully used all possible means of avoiding liability. The Columbus, 5 Sawy. 487. There are doubtless circumstances in which the known obligation of the charterer to pay for supplies would not prevent a lien on the ship, as where a vessel is in a foreign port in distress, with no means of obtaining supplies necessary to complete her voyage and reach the hands of her owners, and where express notice not to credit the ship had not been given. In such cases the

> interests of her owners and the necessities of the case might raise an implied authority in the master from the owners to obtain necessary supplies on the credit of the ship, notwithstanding the charterer's known obligation to pay for them. The Monsoon, 1 Spr. 37; The City of New York, 3 Blatchf. 187, 188".

In *The S. M. Whipple,* (1881) 14 Fed. 354, it was held:

> "Where the owner, who charters a vessel to third parties and under the terms of the charter-party appoints the master for the term of the contract, seeks to displace the lien given by statute for materials and supplies furnished the vessel by setting up a private agreement by which the master was deprived of the authority to create liens on the vessel, he should show by clear proof that explicit and unequivocal notice of the facts was given to persons dealing with the vessel."

The Secret, (1879) 15 Fed. 480.,

Blatchford, Circuit Judge, said:

> "Although The Secret was in a foreign port, and although Murray, Ferris & Co. when ordering the coal, stated to Russell & Hicks that it was for The Secret, yet the circumstances were such that the libelant's agents, Russell & Hicks, were put on inquiry, from which they could easily have learned this, notwithstanding the above facts. Murray, Ferris & Co. were the charterers of the vessel, and had no power to bind the claimant or the vessel to pay for coal bought for her. If they had used due diligence they would have ascertained such want of power."

Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726, where the court says:

"Again, the ship in this case was under no necessity of proceeding upon her new trips, for which this coal was furnished. Savage, by his charter, had no right to pursue her ordinary navigation at the ship's expense. If he could not fit her out for her trips without resorting to her own credit, having no right to use that credit for ordinary supplies, it was his duty to surrender her, or, at least, not to run her until he could arrange to do so without a violation of his agreement with the owner. There was no commercial necessity that she should depart upon this trip; and the general owner had no interest that she should be navigated except according to the terms of the charter. In this respect the case is wholly different from that of The City of New York, 3 Blatchf. 189, where the vessel was in a port of distress, on an unfinished voyage, and where the interest of the ship and of her general owner also required the supplies. Broadly considered, therefore, the first requisite for a lien, viz., a necessity for the supplies did not exist. Had Savage, being under no necessity to continue the vessel's trips, and not being in any port of distress, expressly contracted for ordinary supplies on the ship's credit, this would have been a clear wrong to the general owner, and a violation of the terms of the charter, because the stipulation of the charter was for the very purpose of preventing this. The language of the supreme court in the case of Gracie v. Palmer, 8 Wheat. 605, 639, would in that case seem to be applicable. 'The charterer', the court says, 'has contracted with the shipper (here the material man) to do an act which he could not perform without violating his own contract with the ship's owner; and he must therefore be considered as having entered into a contract subordinate in its nature to that previously existing between the owner and charterer.' And this was approved in The Freeman v.

> Buckingham, 18 How. 182. In the case last cited, Curtis, J., also expressly limits the effect of the ordinary maritime usages to 'contracts * * * entered into with a person who has no notice of any restriction.' Page 490. But, in the present case, Savage clearly had no intention of violating the charter, or of obtaining supplies on the ship's credit, and the question of his *power* does not, therefore, properly arise in this case. The notice, moreover, given by the captain to the libelants, was of itself one of the terms upon which the coal was supplied. The captain is the person who in a foreign port specially represents the ship and all interests combined. When he gives notice that the ship is not to be bound for supplies, that becomes one of the terms on which any supplies subsequently delivered must be deemed furnished, and which estop the material-man from asserting the contrary. Considering the knowledge of the charter that the libelants possessed, as well as this notice from the captain, and the fact that the supplies were for the ship's ordinary use, and not under the stress of any maritime necessity, or in a port of distress, the obligations of good faith, without the observance of which no lien is sustained, estop the libelants from asserting any credit to the ship, or holding her answerable." (Citing cases.)

The Cumberland, (1886) 30 Fed. 449, 455, where the court said:

> "The same conclusion would follow in the case of Philbrick, who furnished coal to the amount of $900 during November, December and January, upon the application of the masters, were it not for one circumstance. He says he had no knowledge of how the boat was being run; that the coal was furnished upon the credit of the boat, and he would not have furnished it upon the credit of the owners or

> McKay; but he admits that on the twentieth December he met a party who claimed to be her owner, and informed him of the charter and its terms. This I consider sufficient to put him upon his guard, and cause him to make inquiries as to the truth or falsity of the statement, and, if he did not, he cannot claim to have been acting in good faith, and without notice. Judgment will be allowed for the amount of coal furnished before the date when he received this information, and the rest disallowed."

The Ellen Holgate, (1887) 30 Fed. 125, where the court held:

> "Persons supplying provisions for the crew, and those advancing money to pay the claims of material-men, may look to the vessel for payment, if the transactions have taken place away from her home port, and at the request of her master, unless it can be shown that the master was without authority, and that the parties had knowledge of such want of authority."

The International, (1887) 30 Fed. 375, where the court said:

> "Had this been a question of materials or supplies furnished by a material-man having knowledge of the terms of the charter, no lien upon the vessel would have been sustained, unless the supplies were furnished in a port of distress, and were necessary to enable the vessel to reach her owners, i. e., unless the supplies were necessary to the ship and her owners, and not merely to the charterer's business." (Citing cases.)

In *The Samuel Marshall,* (1892) 49 Fed. 754, 760, the court in denying a lien for coal furnished on the order of the master, said:

> "But the merchant is presumed to know that it is a common thing for a vessel to be hired, and to be managed and used, in the employment of others, under charter-party with the owner or otherwise, under circumstances where the obligation for supplies does not rest upon the owner. And if the facts presented to him are sufficient to induce a reasonably prudent man, having a just regard to the rights and interests of others, to suppose it probable that the owner is not employing the vessel, but that it is in the service of another, under charter or other agreement involving the payment of charges and expenses by the charterer or lessee, he is bound in good faith to inquire. When the circumstances denote that the owner of the vessel is not the party for whose interest the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another, and assert a lien therefor, contrary to the stipulations and interests of the owner. * * * The merchant is under no obligation to furnish the supplies. He may do so, or not, and he may sell for cash or on credit, as he thinks advantageous to himself. If he does furnish and on credit, in the face of an agreement between others of which he has notice, devolving the obligation of payment upon another than the owner, and denying to the charterer the right to hypothecate the ship, he ought not to be allowed to assert a lien upon the owner's property."

The decision in this case was affirmed *(The Samuel Marshall*, (1893) 54 Fed. 396) and in writing the opinion of affirmance, Taft, Circuit Judge, said (pp. 398-399):

> "The questions in the case are two: First, Did the libelants obtain a lien for the coal fur-

> nished to the steamer Marshall under the general maritime law? Second. If they did not, then are they entitled to a lien under the state law of Michigan? Judge Severens, in the court below, held, in a satisfactory and convincing opinion, that they had no lien in either aspect of the case, and we entirely concur with him in that view."

Judge Taft also said (p. 404):

> "It is true that, under certain circumstances, the master of a vessel, under a charter, where the charterer is the owner pro hac vice, may hypothecate his vessel for supplies, contrary to the terms of the charter-party, but this is where there is dire necessity to save the vessel, or to bring her home within the reach of the owners. No such case is here presented. This was the home port of the charterers. The necessity was only that of going on the voyages for which the vessel was chartered, and not to bring the vessel home to its owners, or to save it from injury or loss."

The decision was followed in *The Kate*, (1893) 56 Fed. 614, and the latter was affirmed in

The Kate, (1896) 164 U. S. 458,

where the Supreme Court said:

> "If no lien exists under the martime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under the law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the ves-

> sel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.
>
> * * * * * *
>
> "If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter-party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter-party but charged it only with knowledge of the facts that the vessel was being operated under a charter-party, a different question would be presented."

The opinion of Judge Severens in *The Samuel Marshall* (supra) was approved by the Supreme Court in

The Valencia, (1897) 165 U. S. 264, 272-3,

where it was said:

> "Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter-party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine. We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the possession and control of a vessel under such a charter-party cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

The opinions rendered in *The Samuel Marshall* (supra) were approved in *The Alvira,* (1894) 63 Fed. 144, 160, in which the court said:

> "Counsel for claimants rely greatly upon *The Samuel Marshall* case, 49 Fed. 754; Id. 4 C. C. A. 385, 54 Fed. 396. The opinions in that case contain a very satisfactory statement of the law of domestic liens, both in the decisions of the district Judge and of the appellate tribunal (Circuit Court of Appeals, Sixth Circuit); but upon a careful reading of the case I do not find anything inconsistent in the law, as there expounded, with that of the case at bar. The facts are of a different character, and this, of course, must be taken into consideration. In that case both the lower court and the appellate tribunal held that actual notice had been given to the supply man. In the case at bar no actual notice was given to the material men, nor am I able find, from the evidence produced, that they were in possession of such facts as ought to have put them upon inquiry, or that their failure to be informed was due to carelessness or indifference. In the case of *The Samuel Marshall* the owner had no actual notice of the furnishing of the coal, and had, therefore, no opportunity of protecting himself by notifying the supply man. In the case at bar the owners were fully apprised of the fact that repairs were being made, and that materials were being furnished therefor. There, the coal for which a lien was claimed was something which the charterer was bound to furnish, and for which the owner received no direct benefit; here the owner derives some benefit in getting back an improved vessel. I do not allude to this last feature as constituting a distinguishing mark which would require the application of different principles of admiralty law, but simply to show that the facts of the Samuel Mar-

> shall case are not analogous, in their main features, to the case at bar."

In the course of his opinion in *The Alvira* (supra) Judge Morrow lays down the precise rule for which we contend in this case. He says:

> "Therefore, the general principle that the owner is deemed to consent to the accruing of liens where the entire possession, control, and management of a vessel is intrusted to another is qualified by this condition: If the supply or material man know of the charter or the relation in which the ostensible owner holds, or if he be advised of the real status of such relation by the general owner or by the charterer, or is placed in possession of such facts as would put, or ought to put, a reasonably prudent man on inquiry, the presumption arises that the supplies, materials, or repairs were furnished upon the credit of the charterer himself, and there is no lien. And the onus lies on the supply or material man to remove this presumption. The reason for this is plain. Courts of admiralty do not favor secret liens; otherwise, owners would often fall an easy prey to liens created by injudicious or unscrupulous charterers. Moreover, the supplies, materials, or repairs are generally furnished exclusively for the benefit of the charterer; at least it may be said that he is the party primarily benefited thereby, the owner, as a general rule, being only incidentally benefited, if at all." (Page 156.)

In *The Rosalie*, (1895) 75 Fed. 29, it was held:

> "Where materials were furnished for the use of a vessel, upon the order of a company which had possession of her under a contract of purchase, and which was therefore, the owner pro hac vice, in the port where such company had

> its principal place of business, by material men who either knew the company's relation to the vessel, or were in possession of the avenues of information, and of facts sufficient to put them on inquiry, held, that credit must be considered to have been given to the company, and that, consequently, no lien was created. The Alvira, 63 Fed. 144, distinguished.
>
> The mere fact that persons furnishing materials in the home port, on the order of the owner pro hac vice, 'suppose' that the vessel is good for the purchase price, is not of itself sufficient to create a lien."

Another decision which, if followed, is absolutely determinative of the instant case, is *The H. C. Grady,* (1898) 87 Fed. 232, where Judge De Haven said:

> "The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.
>
> It is claimed by the intervener, Strong, that under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the

general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the martime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not in the State where she belongs, and where her owner resides.

* * * * * *

"There was nothing, in the facts or circumstances, under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * * *

"In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fed. Strong in the sum of one thousand dollars.'

* * * * * *

"The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under a contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * * *

"As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials

> furnished and repairs made; and if after its execution their claim therefor must be held to be subordinate to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals in the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

Judge Hawley recognized the same doctrine when he said in *The Robert Dollar,* (1902) 115 Fed. 218, 219-220:

> "It is shown by the uncontradicted evidence in this case that, while the Robert Dollar was being operated as a carrier of freight and passengers between Seattle and Nome and other places in Alaska, it was necessary for her to replenish her supplies of coal and water at Dutch Harbor, both in going north and returning; that her master did not have money to pay her bills for these necessaries; and that upon his request the libelant furnished coal, water, and provisions to the steamer, which were necessary for her use and to feed her passengers and crew; that neither the owner nor charterer had any credit at Dutch Harbor; and said supplies had to be obtained on the credit of the ship. These are the conditions under which, by the maritime law, a lien becomes attached to a ship, and the only semblance of a defense to this part of the case is made upon the ground that by the charter party it was agreed between the owner and the charterer that the latter should pay all the bills incurred in operating the vessel during the period for which she was hired, and should at the expiration of said

> period, return the vessel to her owner free from liens. It is not pretended that the libelant had actual knowledge of this stipulation in the charter party; but it is claimed that the fact that the vessel was chartered to the Alaska & Pacific Steamship Company had been announced in newspapers, and was generally known among merchants and shipping men, and that the captain had possession of a copy of the charter party; so that if the libelants had made inquiry they might have become informed with respect to its conditions. There are two reasons why this defense cannot prevail. In the first place, the indebtedness was incurred by the master of the ship, who was appointed by the owner, and whose authority was ample to abrogate the agreement whenever it became necessary to do so in order to enable the vessel to get on and complete her voyage. The second reason is that this defense is not available to the charterer. Liens for supplies upon chartered vessels, in favor of creditors to whom notice has been given that the owners have parted with their possession relying upon agreements that the charterers will keep them free from liens, are not permitted, because the pledging of the credit of a ship under such conditions would be fraudulent, and the courts have refused to recognize such fraudulent claims in cases in which the owners have appeared to defend against them. But when a charterer obtains supplies on the credit of a ship in violation of a promise made to the owner that he will not do so, he has no right to plead his own broken promise to defeat his creditors."

Judge Hawley allowed the lien, but the decision was reversed and the libel was dismissed (116 Fed. 601).

In *The George Farwell*, (1900) 103 Fed. 882, the Circuit Court of Appeals said:

> "The following propositions seem to be established by authority:
>
> "(1) The charterer of a vessel becomes the owner pro hac vice to such an extent that he may bind the ship for repairs and supplies, when there is nothing in the charter restricting him in that particular.
>
> "(2) 'Neither reason nor public policy forbids the owner and the charterer from making' an agreement that the charterer shall supply such things, and keep the ship free of liens therefor. *The Kate,* 164 U. S. 465, 17 Sup. Ct. 138, 41 L. Ed. 516.
>
> "(3) If the person furnishing the labor or supplies knows the terms of such a charter, he cannot have a maritime lien upon a foreign vessel when he furnishes such labor and supplies upon the order of the charterer or the charterer's servants, even though he charges them to the vessel. *The Kate,* supra.
>
> "(4) The same rule will apply even if the person so furnishing labor and supplies has no knowledge of the contents of the charter party, 'If the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.' *The Valencia v. Ziegler,* 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710."

In *The North Pacific,* (1900) 100 Fed. 490, the Circuit Court of Appeals held:

> "The terms of a time charter of a steamer contained provisions indicating that the venture was to some extent a joint one between the owner and charterers. The owner, who was a member of a firm of shipping agents, was to sell the tickets for passage on the contemplated voyages, and his firm were advertised as agents for the vessel. The office of the charterers was

> also with such firm, with nothing to indicate that the business was separate. *Held,* that one furnishing to the vessel necessary supplies for the voyage on the order of the master, without either actual or constructive notice of the charter, was entitled to a lien on the vessel therefor, although by the terms of the charter such expenses were to be paid by the charterer."

In *The Underwriter,* (1902) 119 Fed. 713, Judge Lowell reflects upon the facts of the case, the principles evolved from his profound exposition of the history of maritime liens for supplies and repairs and reaches a conclusion diametrically opposed to the conclusion of the Circuit Court of Appeals in the instant case. The conclusion reached by Judge Lowell is correctly stated in the syllabus, as follows:

> "A charter-party providing that the charterer shall provide and pay for all the coal used by the vessel, and that the master, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, is not merely a contract between the parties which binds the charterer to reimburse the owner for coal paid for by the latter, but is also a limitation on the authority of the master to bind the owner or the vessel for such supplies; and no lien upon the vessel exists in favor of libelant who supplied coal on the order of the master in a foreign port, but which was not a port of distress, and was merely across the river from the home port, where the owner resided, and no actual necessity was shown for pledging the credit of the vessel, and where libelant knew the vessel to be under charter,

> and was put upon inquiry as to the terms of the charter."

In *The Vigilant,* (1907),151 Fed. 747, Judge Gray, speaking for the Circuit Court of Appeals for the Third Circuit, said (p. 751):

> "Notwithstanding the ability of the distinguished judge who delivered the opinion of the court in that case, we are unable to agree that statutory liens of the kind here in question are thus limited. Upon the facts as stated, the case was correctly decided, and the proposition contained in the language above quoted was not necessary to sustain the decision. The Samuel Marshall had been chartered from its owner, with the express stipulation that the charterer was to have full control, employing and discharging officers and men, and with the obligation of paying all running expenses, including the purchase of coal. Libelants furnished coal to the vessel thus chartered, with knowledge of the fact of the charter, and that the master, who ordered the coal, was directly in the employ of the charterer. They also knew that the charterers were under obligation to furnish the coal, and that they had no authority, by themselves or by their agent, to make the owner liable therefor. Under this state of facts, it was held that the supply men had notice that the company had chartered the vessel, and that the coal was furnished on the credit of the charterer, and not of the vessel, and that, therefore, no lien attached under the Michigan statute, giving a lien for all debts contracted for by the owner or master on account of supplies furnished. No debt can be incurred, or lien established on its account, under the maritime law or the statute of the state, except by the authority, express or implied, of the party to be charged. In this case, there was express knowledge by the libelant

> of the stipulation by the charterer, which rebutted any implication of the authority on the part of the master to charge the vessel. The fundamental principles of agency cannot be ignored in the creation of liens, either by the law maritime or the statutory law of the State. The case of The Kate, 164 U. S. 458, 465, 17 Sup. Ct. 135, 140, 41 L. Ed. 512, was decided upon the same grounds."

The last decision preceding the act of 1910, which we have been able to discover is that rendered by the Circuit Court of Appeals of the Seventh Circuit, October 5, 1909, in the case of *Northwestern Fuel Company v. Dunkley-Williams Co.,* 174 Fed. 121.

Every detail of fact in that case is so precisely the same as the details in the instant case, and the decision there is so perfectly contrary to the opinion here, that, we submit, the present decision should not stand without further consideration and without an express disapproval of the conclusion reached by the Seventh Circuit, should it be found that that decision is erroneous.

When one compares Northwestern Fuel Company case (supra), with the instant case, he finds every detail of fact identical. He finds the same provisions respecting the necessity that the charterer shall supply the ship; he even finds "the provision that the charterer will hold the owner harmless from all liens against the vessel," which the learned District Judge felt was so compelling in this case (see opinion pp. 169-170 of Transcript of Record). In the Northwestern Fuel Company case it was fuel that was furnished, coal to permit the vessel to "discharge its peculiar function" of carrying on maritime commerce. The fuel was sometimes received by the captain, himself, personally. "The engineer usually signed the receipt for coal, but sometimes such receipts were signed by the captain, the same being charged on the books of the libelant to the steamer, care of Chicago and Milwaukee line" (p. 124). The libelant testified that: "He gave credit to the vessel upon the supposition that he would have a lien upon her in any event" (p. 125). In neither case did the owner expressly declare to the charterer, in the charter-party: "Thou shalt not permit a lien to attach to this vessel!" Nor in either charter-party was there anything "that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon" (see opinion p. 169 of Transcript of Record). Yet in the instant case, without even a reference to the decision of the Circuit Court of Appeals for the Seventh Circuit (the last decision of any court prior to the act of 1910), the lien is allowed.

In *Northwestern Fuel Company v. Dunkley-Williams Company* (supra), the Circuit Court of Appeals said:

> "The test of liability herein is conclusively stated by the Supreme Court in the case of The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, as follows, viz.:
>
> " 'One furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control or possession of a vessel

under such charter-party cannot acquire a maritime lien, if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.'

"It appears that libelant delivered the coal under the impression that the vessel would be liable therefor in any case. This accounts for its lack of diligence in making investigation as to the facts. The credit was not given to protect the owner's interest in the steamer, but that of parties for the time being operating the boat. Therefore, the question for the court to pass upon is whether libelant had actual knowledge, or was chargeable with knowledge, of the charter-party between appellee and the Chicago Transportation Company. The term 'Chicago and Milwaukee Line' seems to have been merely descriptive of the class of traffic that Petoskey was engaged in, and did not constitute a name. This was of itself a circumstance calculated to raise inquiry. Any effort on the part of libelant to ascertain why the owner of the steamer should operate under such a phrase would have resulted in the discovery of the charter-party and its terms. Nothing short of fatuous confidence in the liability of the steamer for supplies under all conditions can explain the failure to make investigation. Moreover, appellee introduces evidence to the effect that notice of the charter-party was mailed to libelant. The latter denies receiving any such letter. While this may not be conclusive proof of notice, as against libelant it relieves appellee from all suspicion of negligence in the premises, if any would otherwise attach. That no evidence is adduced as to notice to other furnishers of supplies is not persuasive, since the item of coal would be the first to be

> looked after. We deem it clearly shown that whatever negligence there was in the premises was that of libelant.
>
> "The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1,000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1,000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of The Surprise, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter-party.
>
> "The finding of the district court is affirmed."

To this point our quotations have been taken from cases decided under the law prevailing prior to the enactment of the act of June 23, 1910. The subsequent quotations come from cases which arose under the act.

In *The City of Milford,* (1912) 199 Fed. 956, an agreed purchaser was in possession of the ship under a contract, and there was nothing therein which unalterably inhibited the purchaser from incurring expenditures on the credit of the ship that might become a lien thereon. In fact the contract required the purchaser to provide a bond to protect the owner against liens upon the ship. The supplies involved in the libel were furnished upon the order of the master. It would not be simple to conceive of a case more nearly parallel with the instant case. Yet the decision was based entirely upon the question of notice. The court, in its opinion, subjects the testimony to a close analysis, and concludes therefrom that the material-men had no notice that the person in possession held the ship under a notice requiring it to pay for the supplies; and, consequently, allowed the lien. The court said:

> "There is nothing in the evidence to suggest that any of the libelants had notice that the company was not the sole owner of the ship. A number of them proved that, before extending credit, they were told that the company owned the ship. * * *
>
> "The claimant's engineer in person gave the orders for some of the supplies, repairs or services. He approved the bills for others. * * * the claimant, * * * says that had the libelants exercised the reasonable diligence required by the statute, they would have made further inquiry before extending credit.
>
> * * * * * *
>
> "Did the act require them to do all this? Its purpose was to simplify the law. There was need for it. The battle as to the liability of the ship for materials and services furnished it has been going on for centuries. Judge Lowell, in that wonderfully learned and exhaustive opinion of his in The Underwriter, (D. C.) 119 Fed. 713, tells a story of the long struggle. He shows how the questions of substantive law and of policy involved had in the course of hun-

dreds of years become confused and complicated, by being mixed up with differences as to rules of procedure and with disputes as to jurisdiction between the courts of admiralty and those of common law. Rights of materialmen might depend upon whether, when they furnished supplies the ship was in a foreign or in a domestic port. * * * The distinction between foreign and domestic ports had come to be without substantial reason. Congress, in the act referred to, has abolished it.

* * * * * *

"The general purpose of this enactment is plain. Hereafter, when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person entrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say: 'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and,

> if I had inquired, I would have found out the truth; but I did not do so.'
>
> "He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, or agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries, was without authority to bind the vessel therefor.
>
> "Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit." (Citing cases.)

The *Thomas W. Rodgers,* (1912) 197 Fed. 772, and *The Ha Ha,* (1912) 195 Fed. 1013, are each of the same assistance in the present problem as is *The City of Milford* (supra).

The J. Doherty, (1913) 207 Fed. 997, cannot, we submit, be distinguished from this case. There the person ordering the towage was authorized under the Act of 1910 to bind the vessel, because he was the managing owner of the charterer. Yet the court held there was no lien. The court said (page 1001):

> "In the light of these principles the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. Monk v. Cornell Steamboat Co., 198 Fed. 472; 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to to protect her from liens. Moreover, so far as knowledge of the charter-party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally he must be held to know, as a matter of course, that the usual obligations exist. The Surprise, 129 Fed. 873; 64 C. C. A. 309. It is quite possible that the libelant believe that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel. The Samuel Marshall, 54 Fed. 398; 4 C. C. A. 385. Nor was its method of charging the items. McCaldin v. The Stroma, 53 Fed. 281; 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk, Oliver,

> as to the usual practice of collecting from charterers are sufficient to prevent a recovery from the libelant." (Citing cases.)

In *The Malloa,* (1014) 214 Fed. 308, the person in charge was not inhibited from incurring any expense on the credit of the vessel which might become a lien thereon, and yet Judge Cushman proceeded to consider the question of notice and decided (we quote from the syllabus):

> "Facts considered, and held not such as to put one making repairs on a vessel on inquiry as to the authority of the person contracting for the repairs, who was an agreed purchaser of a part interest, and in possession, to bind the vessel therefor under the provisions of Act June 23, 1910."

In *The Francis J. O'Hara, Jr.,* (1915) 229 Fed. 312, the court said:

> "It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (Section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. Rich v. Jordan, 164 Mass. 127; 41 N. E. 56.

"The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence', have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

"The case is not like The City of Milford (D. C.) 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of the vessel) and the other agents of the company lead them (the lienors) to believe that it was the owner of the ship have testified truthfully and accurately.' Rose, District Judge, The City of Milford, (D. C. ubi supra) 199 Fed. at 958.

> "Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.
>
> "It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. The Eureka, (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

In *The Oceana,* (1916) 233 Fed. 139 (affirmed by the Circuit Court of Appeals for the Second Circuit in 244 Fed. 80), the provisions respecting payment for repairs, keeping the vessel free from liens and holding the owner harmless from all liens asserted against the vessel, are substantially the same as the corresponding provisions of the charter party in the instant case.

> "Until the ship should be fully paid for the purchaser covenanted, among other things:
>
> "(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills, for supplies and repairs to said ship and exhibit at reasonable times the ship's accounts, and bills to seller's representatives.
>
> "(b) To keep said ship and equipment in good repair."

Nevertheless the court in confirming the report of James K. Symmers, Esq., the special commissioner, recognized that the fact that the vessel was chartered had been brought to the attention of at least one of the materialmen (Kniffen & Demarest Company), and that no lien could be asserted by it.

In *The Yankee,* (1916) 233 Fed. 919, the court allowed the libel because the supply-man had no knowledge that the vessel was under charter. The court said (pp. 925-6):

> "But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor'. This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or

> no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law."

In the course of its opinion in the instant case, the Circuit Court of Appeals says (see opinion, p. 163 of Transcript of Record):

> "There is a divergence of opinion among the cases as to whether a charter party of the nature and character of the one here involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc. Judge Lowell has held, in a most learned and searching opinion, that it does. *The Underwriter* (supra). But this decision is disapproved by the Circuit Court of Appeals of his Circuit in the case of *The Surprise,* 129 Fed. 873, which impresses us as being based upon the stronger reasoning."

We respectfully submit that the court was in error in concluding that the opinion of Judge Lowell in *The Underwriter* was disapproved in *The Surprise. The Underwriter* is neither mentioned nor referred to in *The Surprise.* The significance of that omission becomes compelling when one realizes that both cases arose in the same circuit; that the opinion in *The Underwriter* is now and was then, recognized generally by courts and commentators as one of the most scholarly expositions available, of a proposition of maritime law; and that the two cases were decided within a period of two years.

The decision in *The Surprise* was concerned with a different question from that concerned in *The Underwriter.*

Judge Putnam, in his opinion, limits *The Surprise* to a case concerning "hand to mouth necessities." He says in his opinion:

> "We wish, also, before taking up the detailed facts on this appeal, to lay aside another element. What were furnished by these libelants were *hand to mouth necessities.*" (34 C. C. A. at page 313.)

Judge Lowell in *The Underwriter* recognized that under some circumstances a lien would be allowed. Judge Lowell says (page 764):

> "Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, when it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists."

The Surprise is based upon facts vitally different from those concerned in this case. *The Underwriter* is based upon facts identical with those concerned in this case.

In *The Surprise* the supplies were "hand to mouth necessities" (supra), and Judge Putnam's opinion is based upon that circumstance. This fact is recognized by libelant's counsel; it is emphasized by the court which rendered the decision and it is so declared by commentators.

Counsel for libelant in referring to *The Surprise* says:

> "The court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessities, and

> so they were in the case at bar. We prefer, however, not to put the case on that basis, but to regard it from a strictly logical standpoint, as did the judge of the lower court."

Indeed, libelant readily recognized that he could not put his case on the basis that the supplies were "hand to mouth necessities", notwithstanding that some of them WERE LIQUORS AND CIGARS. (See bills of account, pp. 147 and 155 of Transcript of Record.)

Judge Putnam was very careful to limit the effect of his opinion in *The Surprise* to the case of "hand to mouth necessities". In the course of his opinion, he says:

> "We have no occasion to comment upon, or lay down any rules with reference to circumstances involving unusual expenses, and with regard to which there would be *ample opportunity to consult the owners* in the usual manner. What, in such event, would be required, in view especially of the fact that *The Surprise* was *a chartered vessel,* is not now relevant (p. 314).
>
> We have an ordinary case of minor supplies furnished to a vessel in a foreign port of the class of which she had immediate need, and a large part of which she could not take up conveniently, except at the place where needed; a case with circumstances under which prior to The Kate and The Valencia, no admiralty court ever refused a lien, unless the owner showed that there was no necessity for credit to the vessel, and that the *merchant* knew that fact, or had very good reason to know it, *or was in some way clearly put on inquiry.* (p. 315.) * * * The conditions with regard to the supplies of the classes furnished by Robin-

> son, when obtained by the authority of the master, express or implied, under the circumstances of this case, are commonly so pressing that they overcome the merely ordinary stipulations on the part of the charterer that he will not burden the vessel with liens." (p. 316.)

A few weeks after rendering his opinion in *The Surprise,* Judge Putnam wrote the opinion in *The New Brunswick,* 129 Fed. 893, and there he said:

> "The petitioner undertakes to bring this appeal within The Surprise (decided by us on March 29, 1904), 129 Fed. 873, and The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, *hand to mouth supplies were furnished* at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered."

In *The Philadelphia,* (1896) 75 Fed. 684, 685, (the basis of the decision in *The Surprise*) Putnam, Circuit Judge, said:

> "The learned Judge of the District Court found that the supplies, in all of the suits, were furnished on the credit of the respective vessels, and that the libelants had no notice that the vessels were under charter in which it was agreed that the supplies should be furnished at the expense of the charterers. * * *
>
> "The supplies were the reasonable hand to hand quantities of coal and water needed for their use in short coastwise trips."

Another circumstance which, we submit, demonstrates that *The Surprise* does not govern, or even apply to the instant case, is found in the language of the judge who wrote the opinion. It will be remembered that *The Surprise* is based upon the decision of the same court in *The Philadelphia* (supra), and it was of this case that Judge Putnam, who wrote the opinion in *The Surprise,* himself, said (*The Iris,* 100 Fed. 104, 107):

> "In the Philadelphia * * *, where it was maintained that the facts were similar to those in The Kate and the Valencia, the question which arose in those cases was laid aside, because the court found that the supplies were furnished under such circumstances that they were to be held as furnished in a foreign port on the orders of the master, thus bringing the circumstances within * * * the supposed hypothetical case stated in The Kate at pages 470 and 471; 164 U. S."

The hypothetical case to which Judge Putnam refers is stated by the Supreme Court (164 U. S. 470, 471) as follows:

> "If the libelant in this case had furnished the coal upon the order of the master, *and without knowledge or notice that the vessel was operated under a charter-party,* or if the coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, *under circumstances which did not charge libelant with knowledge of the terms of the charter-party,* but charged it only with knowledge of the fact that the vessel was being operated under a charter-party, *a different question would be presented.*"

So Judge Putnam practically says that *The Philadelphia,* the basis of *The Surprise,* was decided upon the theory that the furnisher either was ignorant of the charter-party or was ignorant of its terms. Surely a theory which cannot prevail in this case, wherein it is specifically found that the furnisher was notified that the South Coast was under charter and that the charterer was required to pay all bills!

In addition to the evidence which Judge Putnam, himself, furnishes of the fact that his decision in *The Surprise* is limited to the case of "hand to mouth necessities", and in addition to the admission in this regard, or libelant's counsel, we have the criticism of Mr. Fitz-Henry Smith, Jr., in 21 Harvard Law Review 345, where, in referring to *The Surprise,* the commentator says:

> "The opinion lays great emphasis upon the character of the necessaries furnished the vessel."

In the opinion of the Circuit Court of Appeals, it is pointed out that the:

> "terms of the present charter-party as respects the furnishing of repairs, supplies, etc., are * * * those usual to most charter parties".

Furthermore it is said in the opinion:

> "There is a divergence of opinion among the cases as to whether a charter-party of the nature and character of the one involved withdraws the authority of the master to act for the owner in the ordering of repairs, supplies, etc".

It is the combination of these two features which renders this case one of utmost gravity and importance. We have a case for the interpretation of a charter-party whose form is current wherever navigable waters touch the land of the United States. And we have a case where the Circuit Court of Appeals has said there is a divergence of opinion among the courts as to the proper interpretation of this universally used form of charter-party.

The divergence, as we see it, results from the opinion in this case.

Precisely the conditions and facts here involved were presented to the Circuit Court of Appeals for the Second Circuit in *Kniffen & Demarest Company Cross Appeal* in *The Oceana,* (1917) 244 Fed. 80, and the court actually reached a perfectly contradictory result from the result reached in the instant case.

In *The Oceana* (1917) (supra) it was held:

> "The agreement of sale contained, among others, the following covenant by the vendee:
>
> '(5) Until said ship is completely paid for, the purchaser covenants as follows:
>
> '(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills for supplies and repairs to said ship, and exhibit at reasonable times the ship's accounts and bills to seller's representatives.'
>
> "*The libelants contend that this provision as to bonding is an authority to the vendee to create liens; but we regard it, on the contrary, as a prohibition added out of abundant caution.* (p. 81.) * * *
>
> "The Morse Company, claimant, has assigned error to the decree in allowing any of the claims, and *Kniffen & Demarest Company have assigned error for dismissing their libel.* * * *

> "We agree with Judge Veeder that the Bermuda Company was a person intrusted with the management of the steamer within the meaning of Section 2 of the act, while she was lying in the vendor's yard, and that repairs, supplies, or other necessaries furnished between December 10th and 25th, when she was actually delivered and removed, are as much entitled to a lien as those furnished subsequently. *We also concur with his finding, and that of the commissioner, that Kniffen & Demarest Company had sufficient notice to put them on inquiry, and that therefore their libel was properly dismissed."*

The Circuit Court of Appeals for the Seventh Circuit in *Northwestern Fuel Company v. Dunkley-Williams Company,* (1909) 174 Fed. 121, a case identical with the instant case, reached a conclusion diametrically opposed to the conclusion reached in the present case.

The same observation applies when one compares the instant case with the masterly opinion of Judge Lowell in *The Underwriter,* (1902) 119 Fed. 713.

II.

The second proposition announced by the Circuit Court of Appeals is the following:

A SHIPOWNER'S IMMUNITY FROM THE NECESSITY OF PAYING THE SHIP'S BILLS DOES NOT RELIEVE HIS SHIP FROM A LIKE NECESSITY.

We respectfully submit that the application of such a principle is very striking. If an owner need not pay money, but his property will be sold under a lien if he does not pay it, assuredly he is without much comfort! If a person's property may be sold for a debt which he need not pay, assuredly he will conclude that it is only sophistry to say that he need not pay it!

The very point has been considered.

In *The Sarah Cullen,* 45 Fed. 511, the court said:

> "the libelant was informed that the Ridgewood Ice Company was to pay the towage which was equivalent to notice that the vessel was not to pay it".

In *The Iris,* 100 Fed. 104, 109 (the Circuit Court of Appeals for the First Circuit) said:

> "The charterer of a vessel, who has no interest in her hull except for a temporary use under the charter, cannot be said to be procuring supplies at his own charge if he procures them under such .circumstances as would impose a lien on what is the property of the person who lets the vessel."

Surely it cannot be said that any principle of law justifies the conclusion that a man's property is not immune from lien for a debt which the man himself is not required to pay!

Two things equal to the same thing are equal to each other.

III.

The third proposition which the Circuit Court of Appeals announced is the following:

THE PROVISION OF THE CHARTER-PARTY REQUIRING THE CHARTERER TO HOLD THE OWNER HARMLESS FROM ANY LIEN ASSERTED FOR SUPPLIES FURNISHED THE SHIP, IS TANTAMOUNT TO A DECLARATION BY THE OWNER THAT SUCH LIENS MAY BE ASSERTED.

THIS CONCLUSION IS IN PERFECT CONFLICT WITH THE CONCLUSION REACHED BY THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND SEVENTH CIRCUITS RESPECTIVELY.

The identical proposition was presented to and repudiated by Circuit Judges Coxe, Ward and Rodgers in *The Oceana,* (1917) 244 Fed. 80, 81; and Circuit Judges Grosscup, Baker and Kohlsaat in *Northwestern Fuel Company v. Dunkley-Williams Co.,* (1909) 174 Fed. 121.

Not only was the identical proposition so presented and repudiated, but the proposition was predicated, as in this case, upon the provision of a charter-party which, as has been pointed out, is in universal use throughout the seaboard of the United States.

We respectfully submit that the present day expansion of American shipping is such that a conflict on so important and prevalent a provision should be definitely resolved.

We cannot better indicate the striking conflict than by setting forth, *pari passu,* the conclusions of the several courts:

Instant case, Circuit Court of Appeals for the Ninth Circuit:

"The terms of the present charter-party as respects the furnishing of repairs, supplies, etc. are only those usual to most charter parties, and *by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel.*"

(See opinion, pp. 169-170 of Transcript of Record.)

The Oceana (supra), Circuit Court of Appeals for the Second Circuit:

"The agreement of sale contained, among others, the following covenant by the vendee: * * * 'To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by the purchaser.' *The libelants contend that this provision as to bonding is an authority to the vendee to create liens; but we regard it, on the contrary, as a prohibition added out of abundant caution.*"

(244 Fed. 80, 81.)

Northwestern etc. Co. v. Dunkley-Williams Co. (supra), Circuit Court of Appeals for the Seventh Circuit:

"The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1000 we deem *without merit.* Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. *It was evidently placed in the charter-party for the benefit of appellee and not for the solace of those furnishing supplies without reasonable investigation as to responsibility.*"

(174 Fed. 121, 124.)

See, also,

The City of Milford, 199 Fed. 956;

The Gen. J. A. Dumont, 158 Fed. 312;

The Golden Rod, 151 Fed. 6;

Quarles, (District Judge) in *Northwestern v. Dunkley,* 174 Fed. 124, 126-7.

BY THE TERMS OF THE CHARTER-PARTY IN THE INSTANT CASE, AND BY VIRTUE OF THE NOTICE WHICH THE TRIAL JUDGE FOUND WAS GIVEN LIBELANT, THE CHARTERER AND HIS MASTERS AND HIS AGENT, MR. MILLS (Apostles, p. 27), WERE WITHOUT AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES ORDERED BY THEM RESPECTIVELY.

This conclusion follows from the construction which the parties themselves put upon the contract, and from the fact that they promptly notified the libelant of that construction, and from the fact that the libelant never saw or sought to see the charter-party and had no knowledge of its terms, except the knowledge acquired from the statements made to him by the owner, the charterer and his agent.

This conclusion follows furthermore from a consideration of the law as it stood when the statute was enacted. The law then declared that if a charterer be required to provision the ship, and the materialman knows or ought to know that fact, then the ship shall not be liable. As Judge Brown said in *The Sarah Cullen,* 45 Fed. 511, notice that a charterer was to pay for services is "equivalent to notice that the vessel was not to pay it". The Congress did not alter this law. It merely required the materialman to be protected if innocent; but if notified, it required him to pursue that notice, perhaps to call for the charter-party and to determine therefrom whether the owner or charterer was required to furnish the supplies. The law never contemplated that there should be used the precise words "the charterer cannot bind the ship". That conclusion resulted as a fact from the circumstance that the charterer agreed by the charter-party to pay the bills.

That is the precise conclusion which Judge Lowell reached in *The Underwriter* (supra) when he decided that the language used in the charter-party constituted "a limitation on the authority of the captain" *and not* "merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter".

And the same conclusion was reached by Judge Morton when in 1915, he decided that a materialman occupying even a more favorable position than that occupied by Rudbach in this case, was not entitled to a lien (*The Francis J. O'Hara, Jr.,* 229 Fed. 312). In the present case the materialman was warned. In the *O'Hara* case he was bound by facts which he would have known if he had made inquiry. We quote from the opinion as follows:

> "It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to

bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. Rich v. Jordan, 164 Mass. 127; 41 N. E. 56.

The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence,' have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

The case is not like The City of Milford (D. C.), 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of

> the vessel) and the other agents of the company led them (the lienors) to believe that it was the owner of the ship have testified truthfully and accurately.' Rose, District Judge, The City of Milford (D. C.) ubi supra, 199 Fed. at 958.
>
> Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.
>
> It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. The Eureka (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

The conclusion reached in these two cases *(The Underwriter* and *The Francis J. O'Hara Jr.),* the one decided before the statute of 1910, the other after, indicates fairly, we submit, that if a charterer be bound to furnish supplies to the ship and that that fact be known, actually or constructively, to a materialman, then the ship shall not be subject to a lien for the supplies, even though the charter-party did not in precise words provide "the charterer cannot bind the ship".

This proposition would seem particularly to follow, if one apply the rule announced in *The Surprise,* that even though the charter-party be silent upon the point, the charterer must provide supplies for the chartered vessel and *protect her from liens.* The court there said (129 Fed. 873, 877-8):

> "We should also observe that much has been made of the fact that in The Kate and The Valencia, there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in The Kate and The Valencia. The charter (charterer) is bound to disburse the vessel and *protect her from liens,* and impliedly agrees to do so, an agreement as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because, if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on The Kate and The Valencia, regardless of the fact whether there was a formal charter or only an oral one without any express statement of the terms thereof."

However, in considering the effect of the decision in *The Surprise,* it is but fair to bear in mind that the supplies considered therein were "hand to mouth necessities". This appears at once from *The New Brunswick,* 129 Fed. 893, where the court said:

> "The petitioner undertakes to bring this appeal within The Surprise (decided by us on March 29, 1904) 129 Fed. 873, and The Philadelphia, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, hand to mouth supplies were furnished at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered."

In *The J. Doherty,* 207 Fed. 997, the court considered the power of one who had rendered a towage service to a vessel which he knew to be under charter, to assert a lien upon the vessel. After deciding that the towage was not a necessary within the meaning of the act, the court proceeded to state (p. 1001):

> "In short, for towage services rendered in the exigencies of navigation there is at least a presumptive lien upon the boat. Whether such presumption arises, or whether the lien exists, depends upon the circumstances under which the services are rendered. If it appear that the services were not rendered upon the credit of the boat, or *that the surrounding circumstances were such as to apprise the tower that they were not to be so rendered, then no lien exists.* The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264.

In the light of these principles, the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the *charterer is bound to disburse the vessel and to protect her from liens.* Moreover, so far as knowledge of the charter party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The Surprise, 129 Fed. 873, 64 C. C. A. 309. *It is quite possible that the libelant believed that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel.* The Samuel Marshall, 54 Fed. 398, 4 C. C. A. 385. *Nor was its method of charging the items.* McCaldin v. The Stroma, 53 Fed. 281, 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk Oliver as to the usual practice of collecting from charterers are sufficient to prevent a recovery by the libelant." (Citing cases.)

Finally, upon this point we submit the following proposition and authorities therefor:

Supplies furnished a chartered vessel when she is not in distress or in such a position that the supplies availed the owner as well as the charterer, cannot constitute the basis of a lien, if the vessel were held under a charter-party which required the charterer to furnish the supplies and the furnisher knew the facts or by the exercise of reasonable diligence could have ascertained them. And this is so even though the supplies were furnished at the instance of the master.

The Columbus, 5 Sawy. 487; Fed. Cas. 3044;
The William Cook, 12 Fed. 919;
The S. M. Whipple, 14 Fed. 354;
The Ellen Holgate, 30 Fed. 125;
The Cumberland, 30 Fed. 449;
The Sarah Cullen, 45 Fed. 511;
The Samuel Marshall, 49 Fed. 754;
The Burton, 84 Fed. 998, 999;
The Tillie A., 84 Fed. 684, 685;
The H. C. Grady, 87 Fed. 232;
The Algonquin, 88 Fed. 318, 319;
The North Pacific, 100 Fed. 490;
The Underwriter, 119 Fed. 713;
The O. H. Vessels, 183 Fed. 561, 562-3;
The City of Milford, 199 Fed. 956, 959-960;
The J. Doherty, 207 Fed. 991-1001;
The Francis J. O'Hara Jr., 229 Fed. 312;
The Kate, 164 U. S. 458.

Returning, for a moment, to another illustration of the "bad faith" doctrine, we find the decision of Judge De Haven in *The H. C. Grady,* 87 Fed. 232, 233 et seq., where it is said:

> "I think it sufficiently appears from the evidence that, under the agreement, the legal title of the steamer was not to be transferred until

the payment of the balance due upon the contract of purchase; and it was also agreed that the purchasers were, at their own expense, to make such repairs and changes in the construction and equipment of the steamer as they might deem necessary, and were to permit no liens to be filed against her while in their possession, and prior to the time when they should make final payment on account of the purchase price, and Messrs. Crocker & Brooks subsequently gave to said Strong a bond to secure performance of their agreement in this respect. Strong was a resident of Portland, Or., and, prior to her delivery to the purchasers under this agreement, the steamer was duly registered in the office of the collector of customs for that district, by the said Strong, as owner; and one James E. Denny was appointed by him as her master, *and he was instructed by Strong, in effect, to look after his interests, and see that no bills were incurred against the steamer until she was fully paid for.* Denny was also the agent of Crocker & Brooks, and acted for them in the negotiation concerning the purchase and delivery of the steamer. After Strong parted with her possession, under the agreement above stated, the steamer was brought to this state, and from the time of her arrival here until some time in September, 1897, was employed by Crocker & Brooks and others, who seem to have made some agreement with them for interests in the steamer, in carrying passengers and freight between San Francisco and different places on the Sacramento river; and, during the time while she was thus in the possession of Crocker & Brooks,, supplies were furnished to the steamer by certain of the libelants; and materials furnished for her use, and repairs made upon her, and services rendered on board, by other libelants.

1. In my opinion, the contract between the intervenor, Strong, and Crocker & Brooks, and

under which possession of the steamer was delivered to the latter, was a conditional sale.

* * * * * *

2. The libels of the Black Diamond Coal-Mining Company, Meyer & Akmann, H. P. Christie, and C. J. Sbarbaro may be considered together. That of H. P. Christie is for materials furnished and used by him in making certain repairs upon the steamer, and for labor performed by him in making such repairs. The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that, under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not in the state where she belongs, and where her owner resides.

* * * * * *

There was nothing, in the facts or circumstances under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * * *

In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars'.

* * * * * *

The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under the contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervenor, Strong, that all alterations in, or repairs, which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * * *

As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; *and if after its execution their claim therefor must be held to be subordinate* to that of the intervenor, Strong, because, as we have seen, they were charged, by the recitals of the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon

> inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

In *The Mary A. Tryon,* 93 Fed. 220, 221, Judge Brown said:

> "*It is aginst conscience* that in a business like this towages for the charterer's account, when the tower knows that the boats are chartered, should be imposed upon the owner without a previous understanding to that effect. Knowledge that the boat was chartered, and the necessary implication in such a business as this, that the charterer and not the owner should pay for towages, as well as Quigly's testimony to the ordinary practice to collect of the charterers only, and the libelant's dealing with Scott alone and not with any master of the boat, are sufficient to prevent the libelant's recovery. The case is similar in principle to that of The Kate, 164 U. S. 458, where it was held that no lien would exist merely upon dealings with the charterer, even if the credit were given to both the charterer and to the vessel, because the charterer had no authority to bind the vessel. In this regard I do not think towages in the usual course of the charterer's business, and not arising in any exceptional emergency, stand in any better position than repairs and supplies. The same rule was reaffirmed still more pointedly in The Valencia, 165 U. S. 264, where the supply men had no express knowledge of any charter but had knowledge of facts sufficient to put them on inquiry."

In *The City of Milford,* 199 Federal Reporter, 956, 959-60, it was said:

"The general purpose of this enactment is plain. Hereafter when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he visably has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person intrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say:

'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth, but I did not do so.'

He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of

> the terms of the charter party, or agreement for sale of the vessel or for any other reason, the person ordering the repairs, supplies or other ncessaries was without authority to bind the vessel therefor.
>
> Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of the vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty or inquiry as to whether the person who has the management of the ship has the right to pledge its credit.
>
> * * * * * *
>
> It is neither necessary nor appropriate to attempt to suggest what circumstances will be sufficient to put a supply man upon inquiry. In this case it is not contended that there were any. Moreover, the agent of the claimant was on the vessel, knew that all these supplies were being furnished to it, himself ordered an appreciable portion of them, and did nothing to warn those who were supplying them that the ship was not to be bound for them."

Is there any distinction between the instant case and the authorities we have cited. We submit that Rudbach did not act in good faith when he decided in his own mind that he would hold the ship for supplies which he had been told he would need sell, if at all, upon the credit of the charterers. He was not compelled to sell his goods. He did sell them, and for some he was paid by the charterer. He has a claim against the charterer for the balance. He has no just claim against the ship. He was warned before he parted with any of his goods. After failing to collect from the charterer, he is acting in bad faith in attempting to hold the ship.

THE CHARTER-PARTY BY REQUIRING THE CHARTERER TO HOLD THE OWNER HARMLESS FROM LIENS UPON THE VESSEL, DOES NOT CONCEDE TO THE CHARTERER THE AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES FURNISHED BY LIBELANT.

Obviously, this requirement was inserted in the charter-party to protect the owner, not a stranger. Particularly not a stranger who, like Rudbach, never *saw* the charter-party or in anywise depended upon it. It seems to us perfectly patent that the requirement was inserted as a result of the fact that the owner demanded protection against a stranger; a stranger, such as the one in this case, who, in bad faith, might seek a lien upon the vessel.

The precise point was considered and decided by the Circuit Court of Appeals of the Seventh Circuit in *Northwestern Fuel Co. v. Dunkley-Williams Co.,* 174 Fed. 121, and in that case the court said (p. 124):

> "The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of $1000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The $1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of the appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: Paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of The Surprise, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter party."

And upon the trial of the cause, the District Judge said (pp. 126, 127):

> "A persuasive argument is made by libelant as to the construction and effect of the peculiar clause in the charter-party—'and shall not permit her to be in debt for amounts constituting a lien upon her for more than the sum of one thousand dollars, at any time.' It is contended that if the libelant, being put upon inquiry, had examined the charter-party, he would have been justified in construing this clause forbidding the charterer to incur liens exceeding $1000 in amount as an implied consent to liens up to that amount, and that, as there is no evidence that any liens had accrued up to the time this coal was furnished,

> it could not be held a fraud upon the owners to rely upon the security of the vessel within the limits thus fixed by the owners. This argument is specious, but not sound. The clause in question was inserted for the protection of the owner as against the charterer. It required the payment of claims by the charterer before they exceeeded the limit. It is calculated to enforce the duty imposed by the antecedent clause. It was not inserted for the benefit of third parties as a foundation of a claim upon the vessel. The real question for the furnisher to determine primarily was who was bound to pay the coal bills. This question is effectually set at rest by the language of the seventh article of the charter-party: 'That for and during the life of this charter-party, the said party of the second part (the charterer) shall promptly pay all of the running and operating expenses of said steamer'. On learning of this obligation on the part of the charterer, the duty of the libelant was plainly to deal with the charterer, and by that course only could it keep faith with the owners."

In *The Surprise* (supra) the court indicates that the way in which an owner should protect himself against a lien is the very way which the trial judge held in this case results in subjecting the ship to the lien. In *The Surprise* the court said (p. 880):

> "If, in these respects, there is any violation of any agreement, express or implied, between owners and charterers, the owners must protect themselves, as was done in the case at bar, by taking an obligation with a surety, or by terminating the charter for a breach of the terms thereof."

In *The City of Milford,* 199 Fed. 956, the charterer was required, as in the instant case, to hold the owner harmless from liens against the vessel. In fact, the charterer was required to give a bond conditioned to protect the claimant by reason of liens or other claims against the ship arising through or under the charterer. Yet this was not said to indicate that the charterer had authority to bind the vessel. The court decided that a lien would prevail because no notice of the terms of the charter-party was brought even constructively to the libelant.

And in *The Golden Rod,* 151 Fed. 6, the lien was not allowed, notwithstanding that the charterer had "engaged to furnish a bond to protect against any liens for seamen's wages, repairs, supplies, etc."

Finally, upon this proposition we submit that the particular provision of the charter-party from which the learned District Judge drew his inference, should be deemed to refer to such liens as those for seamen's wages, for which a vessel would be responsible irrespective of the agreements of the owner and charterer *(The Gen. A. J. Dumont,* 158 Fed. 312, 314).

EVEN IF IT COULD BE HELD THAT THE TERMS OF THE CHARTER-PARTY WHEN READ LITERALLY, FAIL TO DEPRIVE THE CHARTERER OF AUTHORITY TO BIND THE VESSEL, YET THE TERMS UPON WHICH THE VESSEL WAS IN FACT HELD, AS EVIDENCED BY MR. SOOY'S LETTER TO MILLS, THE CHARTERER'S AGENT, AND HIS ACQUIESCENCE AND THE ACQUIESCENCE OF THE CHARTERER, HIMSELF, THEREIN, DEPRIVED THE CHARTERER OF AUTHORITY TO BIND THE VESSEL; PARTICULARLY IN VIEW OF THE FACT THAT A CHARTER-PARTY MAY BE ORAL, AND THE FURTHER FACT THAT THE LIBELANT WAS NOTIFIED THAT THE VESSEL WAS UNDER CHARTER AND WOULD NOT BE LIABLE.

There is no doubt that Mills was the agent of Levick, the charterer. We submit his testimony on that point (particularly page 96 of Apostles).

> "Q. After Levick appeared upon the scene of action did you act at all for Captain Roberts and Mr. Sooy in connection with the 'South Coast'?
> A. No, I did not. You mean in any capacity whatever?
> Q. In connection with the 'South Coast'?
> A. No, I did not."

There is no doubt that Mr. Sooy wrote the letter to Mills which is set forth in the record (pp. 78-79):—

> "June 26, 1915.
>
> Mr. E. A. Mills
> Pacific Wharf & Warehouse Co.
> East San Pedro, Cal.
> Dear Sir:
> Under the provisions of charter and option given by the South Coast Steamship Co., the owners of the S. S. South Coast, to Mr. Levick, the repairs now being made to this vessel are

> to be made for the credit of Mr. Levick and not upon the credit of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify all persons furnishing said supplies, labor or materials, to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters because if we wrote it it might in some way injure Mr. Levick and this I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am
>
> Very truly yours,"

This is found as a fact by the court (p. 121 of Apostles).

There is no doubt that Mr. Sooy warned the libelant, as he testified, before any of the supplies here involved were delivered (pp. 72-73 of Apostles):—

> "Q. Will you account, please, the conversation you had with Mr. Rudbach on that occasion?
>
> A. In substance, I can; I cannot, of course, give the exact words of it, but I said to Mr.

Rudbach, 'You have furnished an order of goods here to the steamer South Coast'. He said, 'Yes, here they are'; they were laid out in a run-way, a sort of alley-way in his store there, as I recall it, between two streets, and I said, 'Do you understand from Captain Roberts that the ship is not responsible for these bills?' He said, 'Yes, but Captain Roberts tells me that he is going to pay me out of the money that he gets from Levick'. I said, 'Captain Roberts is the President of the South Coast Steamship Company and I am Secretary and attorney for it, and Captain Roberts has just told me', and that was the way Captain Roberts introduced me to Mr. Rudbach, and I said, 'I do not want any question at all about this bill or about any other bills that may be incurred on behalf of the "South Coast", and I have come here particularly to tell you that.'

Q. Was anything further said?

A. Then Roberts said that Levick would be in San Pedro on that afternoon, with the understanding that he was to turn over the money to Roberts, and that Roberts would pay Mr. Rudbach.

Q. That was stated at that time, was it?

A. That was stated at that time.

Q. As a matter of fact, do you know whether Captain Roberts at that time occupied some position on the vessel?

A. He was Captain of the ship.

Q. Employed by whom?

A. By Levick.

Q. For what purpose, for what voyage?

A. For the purpose of going to Ensenada and return.

Q. Just for the one voyage?

A. Just for the one voyage."

Rudbach disputes this; but the court believed Mr. Sooy and not Mr. Rudbach (Opinion p. 121 of Apostles).

> "He was also warned by Mr. Sooy, one of the owners, not to deliver any goods on the credit of the ship."

There is no doubt that Levick, the charterer, acquiesced in the letter which Mr. Sooy sent Mills (testimony of Mills, pp. 94-95 of Apostles):

> "Q. Now, do you remember having received a letter from Mr. Sooy concerning the payment of bills?
>
> A. Yes, that was several days after the boat had arrived.
>
> Q. Several days after?
>
> A. That was after Captain Roberts had told me the same thing.
>
> Q. Captain Roberts told you the same thing?
>
> A. I also received the same information from Mr. Levick that Levick & Oliver were to be responsible for the bills."

There is no doubt that the libelant had notice. The court found (p. 121 of Apostles):

> "Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills."

There is no doubt that a charter-party may be oral.

The J. Doherty, 207 Fed. 997, 1001;
The H. C. Grady, 87 Fed. 232;
James v. Brophy, 71 Fed. 310.

Consequently, we submit that the terms upon which the vessel was held are not those delineated literally by the charter-party, but those which the parties believed and declared were the true facts of the case; as evidenced not alone by the formal charter-party, but by all of their writings and transactions.

> *Raymond v. Tyson,* 17 How. 53;
> *James v. Brophy,* 71 Fed. 310;
> *Barreda v. Silsbee,* 21 How. 146.

And as we have frequently pointed out, the libelant cannot complain. He never saw the formal writing and he never sought to see it.

IV.

THE LAW APPLICABLE TO THIS CASE WAS NOT ALTERED BY THE ACT OF JUNE 23, 1910 (36 Stat. L. 604).

This proposition coincides with the conclusion for which appellant has contended throughout this cause, and by the same token, it is in conflict with the position which libelant took. Libelant believed that his cause could not prevail if it were concluded that the Act of 1910 did not ordain a principle of law different from that which prevailed theretofor. In his brief in the Circuit Court of Appeals, libelant said:

> "There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it". (Appellee's brief, p. 2.)

> "The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens is immaterial under the Federal Act of said date." (Pages 7 and 8 of appellee's brief.)

Notwithstanding libelant's contention that the law was so altered by the Act of June 23, 1910, as to render immaterial, knowledge on the part of the supply-man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, the court held that the Act of 1910

> "was intended as declarative of maritime law respecting the subject, as it existed prior to the enactment. It was not designed to ordain any new or different principle of law."
>
> (Transcript of Record, p. 167.)

In this respect the court's opinion coincides with the conclusion reached by the other courts of the country.

The Sinaloa, 209 Fed. 287, 288;
The Dredge A, 217 Fed. 617, 628-9;
The Yankee, 233 Fed. 919, 925-6.

Any other conclusion would disregard these two principles:

(a)—

> "The presumption is that the legislature does not intend to change or modify the law beyond what it declares in express terms, or by unmistakable implication."
>
> (*The Dredge A* (supra).)

(b)—

> "It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be extended by construction, analogy or inference."
>
> (*The James T. Furber,* 157 Fed. 126, 129.)

Pratt v. Reed, 19 How. 359, 361;
The Lottawanna, 21 Wall. 558;
The Aurora, 194 Fed. 559;
The Yankee Blade, 19 How. 82;
The Dixie, 236 Fed. 607, 608.

THE TERMS OF A CHARTER-PARTY OR AGREEMENT FOR THE SALE OF A VESSEL ARE NOT THE EXCLUSIVE SOURCE OF A CHARTERER'S INABILITY TO CREATE LIENS UPON THE VESSEL.

The statute (Act of June 23, 1910) specifically provides that there shall be no lien if the furnisher knew or could have ascertained by the exercise of reasonable diligence that *for any reason,* the person ordering the supplies had no authority to bind the vessel therefor. The furnisher in the instant case, had been warned that the owner and the charterer had agreed, either by the terms of the written charter-party or by some other contract, that the vessel should not be held. Before he furnished the goods he had been informed of this fact by the owner (Apostles 72), the charterer (Apostles 36-37) and the charterer's agent (Apostles 95, 97). As the trial court found:

> "So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given."

The merchant did not depend upon what the learned trial Judge found to be a defect in the charter-party; because the merchant never saw the charter-party or requested to see it (Apostles pp. 44-45). All he knew was what he had been told by the owner, the charterer and the charterer's agent, viz., that the charterer and not the vessel would be liable for the provisions.

Primarily we are considering a question of agency. The master is assumed to be the agent of the owner for the purpose of charging the vessel with a lien under certain circumstances. If the master has not that authority then he simply "is without authority" and "unalterably inhibited" from assuming an authority which he has not.

We submit that if the charter-party by its terms discloses that the master "is without authority", as it does in the instant case, it is just as strong an expression, for the purpose, as the direct one that he is "unalterably inhibited" from creating a lien on the ship, and a far cry from meaning the opposite, by implication.

It was the construction placed upon the charter by the charter-parties themselves, and the charter should be construed with a view of sustaining and giving effect to its terms and not the opposite.

The learned Judge failed, we respectfully submit, to accord the necessary, or, for that matter, any consideration to the words *"or for any other reason"* found in the statute.

The statute specifically provides that a furnisher of supplies shall have no lien if he knew or by the exercise of reasonable diligence could have have ascertained that the person ordering the supplies was without authority to bind the vessel therefor; because:

(a)"of the terms of a charter-party",
(b) of the terms of an "agreement for sale of the vessel, or"
(c) "for any other reason".

(Act of June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, Sec. 7787.)

Notwithstanding the words *"or for any other reason"*, appearing in the statute, the learned District Judge limited the application of the statute to the terms of the charter-party. This is obvious from the following excerpt from the court's opinion:

> "And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor."

In our assignment of errors, we specified particularly that the court erred in this interpretation of the statute.

We submit that the effect of the interpretation is to eliminate from the operation of the statute, cases which the Congress, by the use of definite words, included in the operation of the statute. We will proceed now to notice some of those cases:

We have already referred at length to *The Underwriter.*

In *The Valencia,* 165 U. S. 264, it was held:

> "A maritime lien on a vessel is not created by supplying coal to it on the order of a charterer, without any order or procurement of the master or his expressed consent, where the charterer was required by the charter to provide and pay for the coal, and had an office at the port of supply so that the party providing it could easily have ascertained the ownership of the vessel and the relation of the charterer to it, although he acted in fact on a belief that the vessel was responsible."

What does one see when he reflects the light of that decision upon the facts of the present case? In each, the charterer was required to pay for the supplies. In each, the charter-party failed to specifically provide that the charterer should have no power to permit liens to attach. In each, the merchant knew the owners. In each, the merchant could have discovered the precise terms of the charter-party (in fact the merchant was informed of them in the instant case). In each, the merchant looked to the vessel.

There is, of course, this difference in the two cases. In *The Valencia,* the supplies were ordered by the charterer himself, whereas in the instant case the supplies were ordered by the master (except in the case of the items aggregating $361.38, evidenced by libelant's "Exhibit 6", which were ordered by Mr. Mills (Apostles pp. 26-27) the charterer's agent (Apostles p. 96).

But this difference does not affect the point which we now urge; namely, that specific provisions in the charter-party, forbidding the charterer to bind the vessel, are not the exclusive criteria; that even though a charter-party be silent upon the subject of liens, yet a charterer can not bind the vessel for goods ordered by him if the charter-party required him to furnish the supplies, and the furnisher had notice thereof.

Thus we have found one illustration of the *"any other reason"* which the Congress had in mind and which, we respectfully submit, the learned District Judge ignored.

And in this connection has there not been a breach of a well recognized canon of statutory construction? It would seem so from a consideration of the decision of Judge Dooling, himself, wherein, in interpreting the Act of 1910, he said in *The Sinaloa,* 209 Fed. 287, 288:

> "The apparent intent of the act was to relieve those persons who formerly would have had a lien if credit had been given to the vessel from the necessity of alleging and proving that credit had been so given. ***The purpose does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had***

> *always been recognized as cognizable in admiralty.*"

A similar conclusion follows a consideration of the Act of 1910 in *The Dredge A.*, 217 Fed. 617, 628-9, in which the court said:

> "This is in accordance with well settled canons of statutory construction by which courts are guided in ascertaining the intention of the legislature. 'The presumption is that the legislature does not intend to change or modify the law beyond what it declares in express terms, or by unmistakable implication'. 26 Am. & Eng. Enc. 649.
>
> Mr. Justice Strong in Shaw v. Railroad Company, 101 U. S. 557, says:
>
> 'No statute is to be construed as altering the common law further than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express.' "

In *The Yankee*, 233 Fed. 919, 925-6, the Circuit Court of Appeals for the Third Circuit said:

> "But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason, a

> person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor.' *This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States.* The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law."

Beyond the error which we submit resulted from a failure to so interpret the statute that no change should be deemed to have been worked except the change expressly declared, it seems to us that the interpretation placed upon the statute by the learned trial Judge is peculiarly unwarranted, in view of the fact that his interpretation unnecessarily *extends* a class of liens which are disesteemed because of their secret nature.

In *Pratt v. Reed,* 19 How. 359, 361, it was said:

> "These maritime liens in the coasting business and in the business upon the lakes and rivers are greatly increasing; and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law in this respect will tend to perplex and

> embarrass business, rather than furnish facilities to carry it forward."

Mr. Justice Bradley in delivering the opinion of the court in *The Lottawanna,* 21 Wall. 558, said:

> "It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages."

Judge Sanborn in *The Aurora,* 194 Fed. 559, said:

> "A maritime lien is a privileged one, secret in character overriding all other liens or transfers, possibly operating to the prejudice of creditors or purchasers without notice. In the nature of things it is *stricti juris,* and must be shown to exist."

Judge Hale in *The James T. Furber,* 157 Fed. 126, 129, said:

> "It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be extended by construction, analogy or inference."

See, also:

The Yankee Blade, 19 How. 82;
The Dixie, 236 Fed. 607, 608;
The Dredge A., 217 Fed. 617, 629;
Taylor v. Weir, 110 Fed. 1005;
The Havana, 87 Fed. 487, 488.

Besides the character of cases indicated by *The Underwriter* (supra) and *The Valencia* (supra), there are many others which fall within the description "for any other reason", adopted by the Congress in the Act of 1910, and in which it must be held under the rules of statutory construction, the Congress intended no lien could attach to a ship for supplies furnished to it. One of these is the case in which there is BAD FAITH on the part of the furnisher of the supplies. Such a case is *The Kate,* 164 U. S. 463, in which it is said (pp. 463-465, 471):

> "We are of opinion that, as the libelant knew, or under the circumstances, is to be charged with knowledge, that the charter party under which The Kate was operated, obliged the charterer to provide and pay for all the coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libelant in fact furnished the coal upon the credit both of the charterer and of the vessel. As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense was known or could have been known to the libelant by the exercise of due diligence on its part. Under the circumstances, the libelant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in *bad faith* to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892. The master of a ship is regarded as 'the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established as well

upon the implied assent of the owners as with a view to the convenience of the commercial world'. The Aurora, 1 Wheat. 96, 101. 'The vessel must get on,' and 'the necessities of commerce require that when remote from the owner, he (the master) should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests'. The St. Jago de Cuba, 9 Wheat. 409, 416; The J. E. Rumbell, 148 U. S. 1. When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. *But no such necessity can be suggested, and no such reason urged, in support of an implied lien for supplies furnished to a charterer, when the libelant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel.*

There are many cases in which the recognition or rejection of liens under the maritime law has depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. *These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel.* As they throw light upon the present inquiry, it is proper to refer to some of them.

In Thomas v. Osborn, 19 How. 22, 31, 32, the court said that all the commentators agree 'that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. Valin, art. 19, Emerigon, Contrat a la Grope, chap. 4, Sec. 8, and the older commentators cited by him. Boulay-Paty, Cours de Droit Com. tit. 1, Sec. 2; Boulay-Paty, Cours de Droit Com. tit. 4, Sec. 14; and see the authorities cited by him in note 1, page 153 * * * 'If,' the court said, 'the master has funds of his own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And *if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel'*. In the same case it was said: 'We are of opinion Loring & Co. (merchants who had given a credit to Leach, to whom had been committed the entire possession, command, and navigation of the vessel) had no right to lend Leach money or furnish him with supplies on the credit of the ship, and cannot be taken to have done so. Our opinion is, that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use, if they had not been wrongfully diverted, no case of actual necessity to encumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances'.

In The Grapeshot v. Wallerstein, 9 Wall. 129, 136, the court, observing that courts of admiralty do not scrutinize narrowly the account against the ship, said: 'They will reject, undoubtedly, all unwarranted charges; but upon proof that the furnishing (of supplies and materials) was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the materialman knew, or could, by proper inquiry, have readily informed himself of the facts'.

So, in Hazlehurst v. The Lulu, 10 Wall. 192, 201-204, the court said: 'Good faith is undoubtedly required of a party seeking to enforce a lien against a vessel, for such a claim (for advances to the master, or for repairs or supplies furnished at his request) but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libelant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. Express knowledge of the fact that the master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.' Again: 'Viewed in any light, it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.'

In The Emily Souder v. Prichard, 17 Wall. 666, 671, the court said that the presumption of law in the absence of fraud or collusion, where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage or to pay harbor dues, or for pilotage, towage and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners, 'can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry'.

In The Sarah Starr, 1 Sprague, 453, 455, the court said that 'in giving credit to the vessel and owners, the materialman should act in good faith, and he would not be deemed to act in good faith if he knew that the master had funds wherewith to pay for the supplies, or, if facts were known to him which would create suspicion and put him upon inquiry, when such inquiry would have lead to knowledge that the master had funds, and had no right, therefore, to obtain supplies on credit. That is, if the materialman had knowledge that the master was acting in bad faith towards his employers, or knew of circumstances which ought to admonish him to make inquiry that would have lead to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the materialman had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created'.

The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libelant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required and he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libelant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the

> vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.
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> * * * * * *
>
> *If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter-party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter-party; but charged it only with knowledge of the facts that the vessel was being operated under a charter party, a different question would be presented.*"

The part which the decision in *The Kate* (supra), plays in the solution of the present problem cannot be better illustrated than by the following observations concerning the Act of 1910, found in the opinion in *The Oceana,* 233 Fed. 139, 146:

> "The act does not mean that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry as to their power, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative

> knowledge of such restriction, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. *The pharse 'knew or by the exercise of reasonable diligence could have ascertained' was adopted from The Kate, 164 U. S. 170, and was used in the Act of Congress to make it clear that, if the furnisher know of the existence of a charter party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost."*

See, also,

The Yankee, 233 Fed. 919, 925-6.

Thus, we submit, that far from having altered the rule laid down in *The Underwriter* (supra), the Congress specifically recognized that rule and declared it to be an accurate statement of the law, by adopting the language of *The Kate* (supra); language upon which Judge Lowell largely based his conclusion in *The Underwriter.*

If the law stands as announced in the decision of the Circuit Court of Appeals in this case, it will make it impossible for an owner to safely charter a vessel, and will tend inevitably to restrict the operation of our increasing mercantile marine, as none, except the very strong financially could obtain a charter.

Independent enterprise will be discouraged, and strong financial combines result.

We respectfully submit that the decree should be reversed and the libel dismissed.

Dated, San Francisco,
October 8, 1919.

Marcel E. Cerf and C. H. Sooy,
Proctors for Appellant.

Oliver Dibble,
Counsel.

FILED
OCT 31 1919
JAMES D. MAHER,
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In the Supreme Court
OF THE
United States

October Term, 1919

No. 68

South Coast Steamship Company (a corporation), claimant of the steamer "South Coast", etc., *Appellant*,	
vs.	
J. C. Rudbach, *Appellee*.	

REPLY BRIEF FOR APPELLANT.

Marcel E. Cerf and C. H. Sooy,
Proctors for Appellant.

Oliver Dibble,
Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No.

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

REPLY BRIEF FOR APPELLANT.

As we pointed out in our opening brief, the language used in the charter-party in depriving the charterer of the authority to create a lien on the vessel is just as efficacious for the purpose as would be language used "unalterably inhibiting" the creation of a lien. How strong must the language be?

Must it invoke a penalty? The appellee admits (Appellee's Brief, page 1) that if the charter-party "contained a clause prohibiting the charterers from giving liens on the steamship 'South Coast' the appellee would not * * * be entitled to a lien" and then argues that appellant claims a limitation on the *presumed* right of the charterer should be implied.

The prayer for the indulgence of presumptions is on the part of the appellee. The decision of the courts with respect to notice is in favor of the appellant, and therefore any *right to a lien* given on the state of facts existing and found in the instant case would necessarily be given only by the extension of that right by inference.

Judge Hale in *The James T. Furber,* 157 Fed. 126, said:

> "It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris,* and cannot be *extended by construction, analogy or inference.*"

See, also:

The Aurora, 194 Fed. 559;
The Yankee Blade, 19 How. 82;
The Dixie, 236 Fed. 607;
The Dredge A, 217 Fed. 617;
Taylor v. Wier, 110 Fed. 1005;
The Havana, 87 Fed. 487.

On the state of facts shown to exist in this case the charterer has no *presumed* right to give a lien on the vessel, and such construction given the charter-party results in an absurdity.

We pass over the contentions of counsel that the cases cited by the appellant, to wit:

> *The Oceana,* 233 Fed. 139;
> *The Surprise,* 129 Fed. 873;
> *The J. Dogherty,* 207 Fed. 997,

sustain his contention instead of that of the appellant. The cases speak for themselves, and the counsel starts with a false premise when he argues (Appellee's Brief, pages 7-8).

> "Thus the legal presumption in favor of a lien *from a given state of facts* would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under the Federal Act of said date and that nothing can defeat his lien except affirmative proof that *he knew, or ought to have known,* that the charter-party *prohibited* the charterer from giving a lien on the vessel." (Italics ours.)

We submit that the charterer *knew* that the supply man was notified by Mr. Sooy expressly that "under the provisions of the charter * * * all persons are to be notified * * * that they cannot hold the vessel for any supplies", and that fact destroys any legal presumption in favor of a lien.

That is the way the charter was construed when the notice was given, and the courts rightly held that *the law applicable to this case was not altered by the Act of June 23, 1910,* and we urge in all seriousness that the notice and language of the charter-party is the equivalent of an "express prohibition" in the charter and affirmative proof that the supply man knew and that the only way in which appellant's rights can be defeated is by a forced construction of the charter-party an extension by such construction of this secret lien contrary to the general principle of maritime law and a consummation reached resulting in an anomaly.

There is nothing in the case of *"The Bud III",* 250 Fed. 918, cited by counsel (Appellee's Brief, pages 15-16) which supports counsel's contentions, or which is contrary to those of appellant.

The court in that case rightly gave a lien because the vessel *was in the possession of the purchaser of the supplies under a contract of sale,* and therefore he had such equitable rights in her as to be regarded as the owner.

There was no question of *notice* involved in that case and the language of the court in holding that Congress intended to give a lien on a vessel for necessaries furnished to it in her home port as well as in a foreign port is clearly inapplicable here.

As we view the situation, the court did not in the case of *The Surprise* (supra) overrule the holding in *The Underwriter* and that is still authority in the instant case, and that the Act of June 23, 1910, did not alter the law applicable to the case at bar, and that a provision in a charter party that the charterer will hold the owner harmless from any lien asserted for supplies furnished the ship is *not* tantamount to an assertion that such liens may be asserted, but equivalent to an inhibition in the charter-party against the charterer creating any liens on the vessel.

Such language should be construed to give effect to its terms, in line with the construction given to it by the charter-parties themselves, "and not for the solace of those furnishing supplies without reasonable investigation as to responsibility." (117 Fed. 121)

Dated, San Francisco,
October 22, 1919.

MARCEL E. CERF AND C. H. SOOY,
Proctors for Appellant.

OLIVER DIBBLE,
Counsel.

Due service and receipt of a copy of the within is hereby admitted

this______________day of October, 1919.

____

Proctor for Appellee.

NOV 1 1919
JAMES D. MAHER,
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. 68

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

BRIEF FOR APPELLEE.

IRA S. LILLICK,
Proctor for Appellee.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No.

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,
Appellant,

vs.

J. C. RUDBACH,
Appellee.

BRIEF FOR APPELLEE.

It is admitted by the appellee that if the charter party in question contained a clause prohibiting the charterers from giving liens on the steamship "South Coast", the appellee would not, under the rulings of the District Court and Circuit Court of Appeals that he had notice of the terms of the charter, be entitled to a lien for the supplies furnished to the vessel by him. The charter party contains no such express limitation on the legally presumed right of the charterer to give liens on the vessel, but the appellant claims that such a limitation should, necessarily, be implied from the provision in the charter that the charterer should pay for all supplies, repairs, and other charges against the vessel. This, in our opinion, does not necessarily follow as the one is not in the least inconsistent with the other. Who shall pay for the supplies is one question and whether or not a lien shall attach to the vessel until it is paid, is another entirely independent of the first.

There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it. An examination of these early cases, however, will convince the Court that the rulings there made can not prevail today against the modern law on this subject which we will hereafter cite. The early cases, however, the "Kate", 164 U. S. 458, 41 L. E. 512, and the "Valencia", 165 U. S. 264, 41 L. E. 710, both cited and followed in the case of the "Underwriter", 119 F. 713, are relied on by the appellants. We cannot better show to the Court the most uncertain state of the law, in this connection, at that time than by referring to the excellent review of the authorities in the latter case by Judge Lowell of the District Court for the Northern District of Massachusetts. The situation was by no means clarified by the local statutes under which most of these cases were decided, but waiving any questions raised by the state statutes, Judge Lowell, on page 751, shows what the various conditions are surrounding a lien for supplies furnished to a vessel under the general admiralty law and the difficulty of enforcing such a lien. On page 755, the Court explains the basis of the decisions in the "Kate" and the "Valencia" as follows:

> "(b) On the other hand in the 'Valencia', 165 U. S. 264, 271, 17 Sup. Ct. 323, 325, 41 L. Ed. 710, it was said that: 'In the absence of an agreement, express or implied, for a lien a contract for supplies made directly with the owner, in person, is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived'. * * * And the extended discussion in the 'Kate', 164 U. S. 458, 465-470, 17 Sup. Ct. 135, 41 L. E. 512, treats the lien as created by authority confided in the master by the owner. This is to say that the non-existence of the lien in the presence of the owner arises from a want of authority in the master to find the vessel when the owner himself is present."

It is true that the "Underwriter" does hold that it is only when a vessel is in a port of distress that a supply man will be given a lien, where the terms of the charter party provide that the charterer shall pay for the supplies, but we think that the proctors for appellant are in error when they apparently claim that that case was affirmed in the "Francis J. O'Hara, Jr.", 229 F. 312. The terms of the charter party, if any, in the latter case are not set out, and, in all probability, there was no charter party. The Court found as a fact that the master was without authority to give a lien on the vessel, citing a case decided by the state Court, Rich v. Jordan, 164 Mass. 127, 41 N. E. 56, which in turn cited three other cases decided by the Courts of that state: Uran v. Fletcher, 1 Gray 125; Baker v. Haskins, 5 Gray 596; Tucker v. Stimson, 12 Gray 487. It seems that all of those local cases were decided under a rule peculiar to the state of Massachusetts, that is, that the master is prohibited from giving a lien on the vessel where the owner has given over the entire possession and control of the vessel to a third party.

Whether in the O'Hara case the denial of a lien was based on a local rule having its inception in a local custom of small fishing craft, or an express limitation of authority in the agreement between the vessel owner and the charterer, is not material, the principal point being that the lien was *not* denied simply because the charterer had agreed to pay for the supplies. This conclusion is further fortified by the Court citing the "Eureka", 209 F. 373, where the charter party contained an express limitation of authority, and observing that the slightest inquiry would have disclosed that the master had no authority to buy on the vessel's account. It seems also that the Court makes a distinction between an agreement to pay for supplies and a limitation of authority to give a lien on the vessel for supplies, and, that the one does not necessarily include the other. The "Francis J. O'Hara", 229 Fed. 314:

> "Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to these important facts."

The holding in the "Underwriter", above stated, has been expressly overruled by the Circuit Court of Appeals in the case of the "Surprise", 129 F. 873. In that case supplies were furnished to a vessel under charter and the vessel was held liable therefor. It was contended by the claimant and owner that the libelant was informed of the charter party and that under the terms of the same, the charterers were bound to pay for the operating expenses including supplies furnished to the vessel and to keep the vessel free from liens. It was held that it is immaterial to the right to a lien for ordinary supplies furnished on the order of the master of a vessel being navigated by a charterer, whether or not there is a formal charter party expressly providing that the charterer shall make all disbursements and protect the vessel from liens, since that is an implied condition of every charter. In holding that a maritime lien existed in favor of the libelant for the supplies so furnished, the Court says on pages 877 and 878:

> "We should also observe that much has been made of the fact that in 'The Kate' and 'The Valencia', there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from

all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in 'The Kate' and 'The Valencia'. The charterer is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement, as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on 'The Kate' and 'The Valencia', regardless of the fact whether there was a formal charter, or only an oral one without any express statement of the terms thereof.

Coming to the merits of the appeal, it will be found that for each libelant, it is disposed of by 'The Philadelphia', except only so far as a distinction can be made, if one can be, arising from the fact that in 'The Philadelphia' it did not appear that the merchant knew, or ought to have known, that there was a charter, while, at bar, the claimant of the steamer insists that the libelants were expressly informed of the charter and its terms, or were put on notice in reference thereto. The conclusion which we reach will concede that additional element."

The Court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessaries and so they were in the case at bar. We prefer, however, not to put the case on that basis, but to regard it from a strictly logical standpoint, as did the judges of the lower Courts.

If then, a supply man, by reason of his having knowledge of the charter party is chargeable also with the knowledge that the charterer is bound to pay the operating expenses of the vessel and keep the same free from liens, it must necessarily follow that Congress in giving a lien for supplies furnished on the order of the charterers, or the master representing them, intended that the further presumed knowledge of the charterer's liability for operating expenses should also be immaterial. Any other interpretation would be most illogical and amount pro tanto to an annullment of the act. For example: A supply man furnishes supplies to a vessel on the order of the master representing the charterers. Under the law (Fed. Stat.) he is entitled to a lien on that state of facts; but says the owner, the law presumes that from your knowledge of the charter, you were also aware that the charterers were bound to pay the operating expenses, and consequently you have no lien. Thus the legal presumption in favor of a lien from a given state of facts would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under the Federal Act of said date and that nothing can defeat his lien except affirmative proof that he knew, or ought to have known that the charter party prohibited the charterer from giving a lien on the vessel.

As far as the appellee is concerned, this case should be decided precisely the same as though there was no clause in the charter party requiring the charterers to pay the operating expenses, for it can not possibly be construed into a limitation upon the authority of the charterers to bind the vessel as required by the third section of the Federal Act. The charter party contains no such express limitation, and we have been unable to find any case decided since the statute was enacted which placed the construction upon it contended for by the appellant. On the other hand, the case of "Surprise" (supra) is referred to in Northwestern Fuel Co. v. Dunkley Williams Co., 174 F. 121, 125, and it was admitted that under the rule of that case the lien would have been allowed except for the fact that it appeared from the evidence that credit was given to the charterers and not to the vessel, a circumstance which is no longer material under the Federal statute. The Dunkley Williams case is thus not in conflict with the rulings of the lower Courts herein as maintained on page 55 and elsewhere in appellant's brief, but is, on the contrary, authority for our contentions herein. Again, the "Surprise" (supra) is quoted with approval in the "J. Dogherty," (1913), 207 F. 997, on page 1001 as follows:

> "By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter party on the part of the libelant is concerned, or his duty to inquire, there is no essential distinction, for if the libelant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The 'Surprise', 129 F. 873, 64 C. C. A. 309."

In the "Oceana", 233 F. 139, 146 (affirmed by C. C. A., see 244 Fed. 80) it was said that:

> "There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restrictions, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority."

The words "must be an actual restriction of authority" are significant.

The charges of bad faith on the part of the appellee need not be considered at length here for if, according to the true construction of the charter party, there was in fact no actual restriction of authority, then there could be no bad faith on the part of the appellee in furnishing the supplies to the vessel. Nor are we disposed to attach any special importance to the clause in the Federal statute: "For any other reason" as that must be interpreted according to the general rule in regard to general words following special words and held to mean "for any other reason similar to the ones set out specially in the statute". The lower Courts unquestionably concluded that the charter party in the present case was the only agreement between the appellant and the charterers which in any way affected the right to give a lien on the vessel, and, consequently, their reference to only the charter party.

It is claimed by the appellant that the letter which it sent to Mr. Mills, set out on pages 75 and 76 of its brief, operated as a subsequent contract or a construction of the former one between the charterer and appellant, and that by its terms the charterers could not purchase supplies on the credit of the vessel. This is on the assumption that Mr. Mills was the agent of the charterers, whereas in fact, he was the agent of the appellant (Apostles, page 61). This is denied by the appellant (page 76), but that is only the conclusion of one of its officers, and a most natural one, in view of the fact that otherwise, it would be prejudicial to the interests of his company. He admits, however, that Mills acted as agent for the South Coast Steamship Company in chartering the vessel to Levick (page 77). It was this same Mills, who was instructed by appellant as its agent to notify those furnishing repairs and supplies to this vessel, that they must look to the charterers for payment, and not to the vessel. It is true that he failed to correctly advise appellee of the contents of the letter containing these instructions, but that does not, in any way, lessen the value of such evidence as showing that Mills was, in fact, the agent, or at least, the ostensible agent for the appellant in connection with this vessel. Besides, it nowhere appears in the evidence that the charterers agreed to the construction placed on the charter party by the appellant, as set out in the letter to Mr. Mills, who denies having been in the employ of either party (pages 92-93). It therefore follows that even if appellee, with the charter party impliedly or actually before him, was served with written or verbal notice by appellant *alone (one* of the parties to the charter party), such notice could in nowise alter the fixed rights of appellant and the owner of the vessel or appellant's statutory right to a lien for supplies furnished—and the charter party contained no "actual restriction of authority", nor, indeed, any restriction of authority.

Again, it must be remembered, that although, as pointed out in appellant's brief, the appellee never saw the charter party in question, still it having been determined by the lower Courts that he had notice of its terms, the case must be determined precisely as though he had read the charter party before furnishing the supplies. In such case it can not be contended that any construction placed upon it by the owner and charterer would be binding upon him but it would be construed according to its legal effect.

The District Court found that

> "while these provisions (of the charter party) require the charterer to pay all expenses incurred in operating the vessel, they do not deprive him of authority to bind the vessel therefor. Indeed, they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel, arising, or created during the term of the charter party" (Apostles, page 123).

In view of such stipulations in the charter party, it would seem unreasonable to hold that the parties did not contemplate that a situation might arise during the course of a voyage which would necessitate the placing of a lien on the vessel. On the contrary, we think that the owner must be credited with common business prudence, and would not compel the charterer to make an agreement which in all probability would be prejudicial to its own interests. As often remarked in the books: "A ship is made to plow the seas," and if a vessel is compelled to lie idle and rot at the wharf because of needed supplies or minor repairs, the costs of which the charterers can not meet on account of insufficient funds on hand, the owner would be injured to a far greater extent than the charterers in nine cases out of ten. He has his vessel at stake and nothing to indemnify him but the uncertain capability of the charterers to respond in damages, or a chance of preventing a surety company from escaping liability in event that a bond was required to secure the faithful performance of the charter party.

In the case of the "Oceana", supra, in which the statute in question in this case was construed the Circuit Court of Appeals, for the Second Circuit, in its opinion, speaking through Circuit Judge Ward, said:

> "Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessaries. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessaries furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners. It created a presumption of law of the vessel's liability for all repairs, supplies, and other necessaries ordered by the master, managing owner, ship's husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner pro hac vice, and conditional vendee. There is an exception in favor of the vessel owner, relied upon by the claimant in this suit, in the case of repairs, supplies, or other necessaries ordered by a charterer or conditional vendee, who has no authority to bind the vessel, provided the repair and supply men knew, or ought with reasonable diligence to have learned, that the charter or conditional agreement of sale deprived the charterer or vendee of this authority.
>
> While it is true that an examination of the records of the custom house at this port would have disclosed the fact that the Morse Company, and not the Bermuda Company, was the owner of the steamer, knowledge of which fact would require the libelants to make further in-

> quiry, we do not see any ground for holding that reasonable diligence required them to make any such search. They were entitled to a lien without giving credit to the vessel, and they were entitled to treat those intrusted with her management as authorized to order repairs, supplies, and other necessaries which would be secured by such a lien. It lay upon the claimant to show some fact or circumstance which would have put these libelants on inquiry, and it has not done so. This is the view taken by Judge Rose in The City of Milford (D. C.), 199 Fed. 956, and by the Circuit Court of Appeals for the Third Circuit in the case of The Yankee, 233 Fed. 919, 147 C. C. A. 593.
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> The claimant puts great stress on the decision of the Supreme Court in The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, made long before the passage of the act of 1910. It is not applicable.
>
> In that case the least inquiry would have disclosed the fact that the company operating the steamer was a charterer bound to pay for coal; but the libelant supplied coal, not on the order of the master, but of the company, without making any inquiry whatever. If he relied for his lien upon the New York statute, we have held that it would be necessary for him to prove that he gave credit to the vessel. The Electron, 74 Fed. 689, 21 C. C. A. 12. This he could not do."

This decision clearly upholds the views expressed by the District Court and Circuit Court of Appeals in the instant case, and is not in conflict with the same as maintained on page 55 and elsewhere in appellant's brief. It will be further noted that in the "Oceana" the charter provided that the ship shall be kept clear from any liens from any cause, and if any lien is filed or asserted, the same to be bonded against, while in the instant case the stipulation is merely that the vessel shall be *returned,* free and clear of liens (Apostles pg. 17). In neither case is a prohibition contemplated or provided for, but, in the instant case, such prohibition is so far from being contemplated that the charterer would not be in violation of charter party if, during the charter period he permitted liens to be asserted, as long as none existed at the return date. Appellee, therefore, with notice of the charter party, could find nothing therein concerning liens during the charter period and prior to return date.

In the case of "The Bud III", 250 Fed. 918, wherein the libelant alleges that the supplies were furnished upon the order of the person in possession under a contract or possession, the Court held, in construing the said Act of June 23, 1910, as follows:

> "Congress could have had but one intent in the passage of this act. It was to give a lien for supplies, etc., to the person furnishing the same, upon the vessel to which same was furnished, under the circumstances set out in the act. If such was not the intent, why specify the conditions under which the supplies, etc., were to be furnished? Theretofore the lien for supplies furnished to a vessel in her home port was dependent upon the statutes of the several states, and Congress, in the fifth section of the act, specifically supersedes all such state statutes. This action alone, even if the words of the act were doubtful, would be very persuasive of the intent to give a maritime lien for supplies

> furnished a vessel, whether in her home port or not. I have examined the cases of The St. Jago de Cuba, 9 Wheat. 409, 6 L. Ed. 122; The Sinoloa (D. C.) 209 Fed. 336, 128 C. C. A. 15, but find nothing in them adverse to this construction of the act of Congress."

As we view the situation, this Court must either overrule the holding in the "Underwriter" (supra), as was properly done in the case of the "Surprise" (supra), or must annul pro tanto the provision in the Federal Act giving to charterers, and their duly appointed agents, the presumed right to give a lien upon a vessel for necessary supplies furnished to it.

We respectfully submit that the rulings of the District Court and Circuit Court of Appeals in this case, that a provision in a charter party requiring a charterer to pay the operating expenses, is not equivalent under the recent statute to a limitation in the charter party on the authority of the charterer to bind the vessel, is a correct statement of the law and that the decree of the Circuit Court of Appeals should be affirmed.

Dated, San Francisco,
October 15, 1919.

Ira S. Lillick,
Proctor for Appellee.

S. Hasket Derby,

Counsel

THE SOUTH COAST.[1]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 68. Submitted November 10, 1919.—Decided March 1, 1920.

In purchasing necessary supplies, the master of a demised vessel, appointed by the owner but under the orders of the charterer, is the charterer's agent. P. 523.

A charter-party, demising a vessel, required the charterer to pay all expenses and save the owner harmless from liens, allowed the owner to retake the vessel should the charterer fail to discharge any liens within a stated period after they were imposed, and placed the master, appointed by the owner, under the charterer's orders. Applying the Act of June 23, 1910, *held* that the charter-party, if it did not grant, at least assumed authority in the charterer to bind the vessel for necessary supplies purchased by the master in a domestic port, and that the statutory presumption of such authority could not be dispelled by denials and warnings from the owner to the supply man. *Id.*

247 Fed. Rep. 84, affirmed.

THE case is stated in the opinion.

Mr. Oliver Dibble for petitioner. *Mr. Marcel E. Cerf* and *Mr. C. H. Sooy* were on the briefs.

They relied largely on the following authorities, decided before and since the Act of June 23, 1910, as sustaining the proposition that a charter-party which requires the charterer to furnish supplies to the ship withdraws from the master the power to order supplies for which the materialman, with knowledge of the terms of the charter-party, may assert a lien. *The Underwriter*, 119 Fed. Rep. 713; *The Francis J. O'Hara, Jr.*, 229 Fed. Rep. 312; *The Columbus* (1879), 5 Sawy. 487; *The William Cook* (1882), 12 Fed. Rep. 919; *The S. M. Whipple* (1881), 14 Fed. Rep. 354; *The Secret* (1879), 15 Fed. Rep. 480; *Stephenson* v. *The Francis* (1884), 21 Fed. Rep. 715; *The Cumberland* (1886), 30 Fed. Rep. 449; *The Ellen Holgate* (1887), 30 Fed. Rep. 125; *The International* (1887), 30 Fed. Rep. 375; *The Samuel Marshall* (1892), 49 Fed. Rep. 754; *The Samuel Marshall* (1893), 54 Fed. Rep. 396; *The Kate* (1896), 164 U. S. 458; *The Valencia* (1897), 165 U. S. 264; *The Alvira* (1894), 63 Fed. Rep. 144; *The Rosalie* (1895), 75 Fed. Rep. 29; *The H. C. Grady* (1898), 87 Fed. Rep. 232; *The Robert Dollar* (1902), 115 Fed. Rep. 218; *The North Pacific* (1900), 100 Fed. Rep. 490; *The George Farwell* (1900), 103 Fed. Rep. 882; *The Vigilant* (1907), 151 Fed. Rep. 747; *Northwestern Fuel Co.* v. *Dunkley-Williams Co.* (1909), 174 Fed. Rep. 121; *The City of Milford* (1912), 199 Fed. Rep. 956; *The Thomas W. Rodgers* (1912), 197 Fed. Rep. 772; *The Ha Ha* (1912), 195 Fed. Rep. 1013; *The J. Doherty* (1913), 207 Fed. Rep. 997; *The Malola* (1914), 214 Fed. Rep. 308; *The Oceana* (1916), 233 Fed. Rep. 139; *The Yankee* (1916), 233 Fed. Rep. 919; *The Oceana* (1917), 244 Fed. Rep. 80.

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[1] The docket title of this case is: *South Coast Steamship Company, claimant of the steamer "South Coast," etc.*, v. *J. C. Rudbach.*

A shipowner's immunity from the necessity of paying the ship's bills relieves his ship from a like necessity. *The Sarah Cullen*, 45 Fed. Rep. 511; *The Iris*, 100 Fed. Rep. 104.

The provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted for supplies furnished the ship is not tantamount to a declaration by the owner that such liens may be asserted. *The Oceana*, 244 Fed. Rep. 80; *Northwestern Fuel Co.* v. *Dunkley-Williams Co., supra; The City of Milford, supra; The Gen. J. A. Dumont*, 158 Fed. Rep. 312; *The Golden Rod*, 151 Fed. Rep. 6; *The Surprise*, 129 Fed. Rep. 873, 880.

By the terms of the charter-party and by virtue of the notice given libellant, the charterer and his masters and his agent were without authority to bind the vessel for the supplies. *The Sarah Cullen, supra; The Francis J. O'Hara, Jr., supra; The Surprise, supra; The New Brunswick*, 129 Fed. Rep. 893; *The J. Doherty, supra.*

The law applicable to this case was not altered by the Act of June 23, 1910. See opinion of the court below. Also *The Sinaloa*, 209 Fed. Rep. 287; *The Dredge A*, 217 Fed. Rep. 617; *The Yankee, supra.* There is a presumption that the legislature does not intend changes not clearly evinced.

"It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris*, and cannot be extended by construction, analogy or inference." *The James T. Furber*, 157 Fed. Rep. 126, 129; *Pratt* v. *Reed*, 19 How. 359; *The Lottawanna*, 21 Wall. 558; *The Aurora*, 194 Fed. Rep. 559; *The Yankee Blade*, 19 How. 82; *The Dixie*, 236 Fed. Rep. 607.

The statute specifically provides that there shall be no lien if the furnisher knew or could have ascertained by the exercise of reasonable diligence that, for any reason, the person ordering the supplies had no authority to bind the vessel therefor. The furnisher in the instant case had been warned that the owner and the charterer had agreed, either by the terms of the written charter-party or by some other contract, that the vessel should not be held. Before he furnished the goods he had been informed of this fact by the owner, the charterer and the charterer's agent. Notwithstanding the words "or for any other reason," appearing in the statute, the learned District Judge limited the application of the statute to the terms of the charter-party.

Mr. S. Hasket Derby for respondent. *Mr. Ira S. Lillick* was on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel against the Steamer South Coast, belonging to the claimant, a California corporation, and registered in San Francisco, for necessary supplies furnished in San Pedro, California. The answer denies the authority of the master to bind the steamer. The bare vessel at the time was under charter to one Levick, the contract stipulating that Levick was to pay all charges and to save the owner harmless from all liens or expenses that it might be put to in consequence of such liens. There was also a provision that the owner might retake the vessel in case of failure of Levick to discharge within thirty days any debts which were liens upon it, and another for surrender of the vessel free of all liens upon Levick's failure to make certain payments. When the supplies were ordered representatives of the owner in San Pedro warned the libellant that the steamer was under charter and that he must not furnish the supplies on the credit of the vessel. He replied that he would not furnish them in any other way, but the reply does not affect the case because by the terms of the charter the master who ordered them, although appointed by the owner, was under the orders of Levick. It is agreed by both courts below that if the owner had power to prevent the attaching of a lien by its warning it had done so. Both courts however held that the charter gave the master power to create the lien. 233 Fed. Rep. 327. 247 Fed. Rep. 84. *S. C.* 159 C. C. A. 302.

By the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604, a maritime lien is given for such supplies and by § 3 a presumption is declared that a master appointed by a charterer has authority from the owner to procure them. It is true that the act goes on that nothing in it shall be considered to give a lien where the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, or for any other reason, the person ordering the necessaries was without authority to bind the vessel. But the authority of the owner to prohibit or to speak was displaced, so far as the charter went, by that conferred upon the charterers, who became owners *pro hac vice,* and therefore, unless the charter excluded the master's power, the owner could not forbid its use. The charter-party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

Decree affirmed.

MR. JUSTICE MCKENNA, MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent.